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APPENDIX
VOLUME II

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-853

UNITED STATES STEEL CORPORATION, et al. - - - - - - - - - Petitioners

versus

FORTNER ENTERPRISES, INC. - Respondent

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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PETITION FOR CERTIORARI FILED DECEMBER 18, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

INDEX

VOLUME II

	PAGE
Colloquy (Plaintiff's Counsel Reading From Exhibits)	569
Testimony of Miles	599
Colloquy in Chambers	631
Testimony of Miles (Resumed)	635
Colloquy (Plaintiff's Counsel Reading From Exhibits)	698
Deposition of Boyd	781
Testimony of Nash	803
Testimony of Horn	818
Colloquy in Chambers	857
Testimony of Horn (Resumed)	864
Testimony of Semonin	867
Testimony of Gilchrest	881
Testimony of Cooper	891
Deposition of Lang	894
Colloquy (Plaintiff's Counsel Reading From an Exhibit)	901
Testimony of Pearson	905

business. Don't waste your time with a lot of insignificant deals that don't have

(Vol. V, p. 58)

much chance for any appreciable volume.

"Let's concentrate on the hundreds of good, qualified builders who could and would use our products and services if they only knew about them."

Q. I would like to refer you, now, sir, to Plaintiff's Exhibit No. 238 which has already been introduced in evidence and there is a part of that Exhibit No. 238, a document that we have marked as No. 240, and ask you if you would take your sales manual there and compare the two headings. "Construction Financing" and "Land Acquisition and Development Financing", and tell us if this is a copy of that. In other words—

Mr. Reutlinger: (Interrupting) You mean what he just read?

Mr. Anderson: Yes sir.

Mr. Reutlinger: Yes ,it is.

Mr. Anderson: All right; we can agree.

By the Court: Stipulated that it is a copy.

(Vol. V, p. 59)

Q. Now, I'll ask you to turn back to pages 6 and 7 of the Land Acquisition one and ask you if you will look at what have been made as Plaintiff's Exhibits 52 and 53 and tell us if these are true and accurate copies of pages 6 and 7 which you—

Mr. Reutlinger: (Interrupting) Now, Mr. Anderson, if you tell me that you copied that actually, we will accept that.

Mr. Anderson: Well, I had it done.

Mr. Reutlinger: All right; that's all right.

The Witness: They appear to be.

Mr. Anderson: All right; we will offer them in evidence.

By the Court: Yes. Let them be filed.

(Whereupon Plaintiff's Exhibit Nos. 52 and 53 were received as evidence.)

Q. Now, I will ask you to refer, Mr. Mack, to the other document which is Plaintiff's Exhibit No. 8.

A. Yes.

(Vol. V, p. 60)

Q. Are you familiar with that document?

A. No sir; I am not.

Q. You are not?

A. I am not.

Q. All right; well, we won't ask you to read from that then, Mr. Mack.

In this period of time, 1961 and 1962, I believe that you became aware of the problems that Fortner Enterprises was having with the components in the prefabricated packages over at the Golden Meadows subdivision?

A. I understood they had complaints; yes sir.

Q. And you at one point made an investigation of those complaints, didn't you; had a meeting with him?

A. I had a meeting with Mr. Fortner, yes.

Q. And you, uh, as a result of that meeting, you prepared a memorandum which I have marked as Plaintiff's Exhibit 4, dated May 3, 1962, but I want to be sure that that is the memorandum you prepared (Indicating).

A. Yes sir; this is.

Q. Would you just read that whole memoran-

(Vol. V, p. 61)

dum to the jury, please sir, and first, we will offer it into evidence.

Mr. Reutlinger: There is no objection. I think you will find this will be easier to read; it's more legible.

A. (Reading):

"As you know, I, along with Paul Grayson—"

By the Court: (Interrupting) Just a moment; have you got a copy? I would like to follow along.

Mr. Reutlinger: I am sorry; yes sir. We have offered it, but here is my only one; but it's all right.

A. (Reading):

"As you know, I, along with Paul Grayson, met with Mr. A. B. Fortner and his organization last Thursday, April 26th, for the purpose of determining the reasons for his dissatisfaction and what we could do to improve relations with this dealer. We had information that Fortner was very much dissatisfied, to the extent that he

(Vol. V, p. 62)

was considering the possibility of discontinuing his program with United States Steel Homes.

"In my discussions with Mr. Fortner, he left no doubt there was considerable dissatisfaction and the possibility of discontinuing his program was not remote. His position was that, through a long list of product problems and deficiencies, his costs had increased considerably, and that his sales group had lost confidence in the product they were selling. We felt that he had priced his product extremely competively, based on the assumption that he would get a quality product, easy to erect, and therefore, with few problems. He stated that the results were the opposite—it had been one series of 'minor' problems from the start, each of which, while only a few dollars in itself, continued to pile costs on top of costs

(Vol. V, p. 63)

to the point where his profit margin was almost nil. Along with this, he stated he had difficulties getting

clearance on buyers. The combination of product problems, loss of confidence by his sales group and the difficulties in getting buyer approval made it impossible for him to carry on the volume program he had originally anticipated. Volume is his big need to maintain the prices he has established. He stated that, while we have been prompt, in most cases, in shipping replacement materials or correcting mistakes, still and all this was not the answer.

"The following are a list of current complaints which he gave to me:"

1. Screens: [illegible] screens are too thick for the channel in the window and, as a result, they bend. We just remove screens and

(Vol. V, p. 64)

search for a screen of proper thickness and then reinstall the screen. Result is extra time and cost.

2. Storm Doors: The stop strip for the storm door is being split because the screws that fasten the strip to the jamb are too short. Also, on the front door the striker plate is frequently set back too far, resulting in the latch chewing up the trim.

He further advised that the chains which we place on the wood storm doors do not qualify for the F.H.A. requirement of a chain check on such doors. Apparently, the F.H.A. inspector interprets the "check" to be an automatic closing device rather than a chain.

3. Windows: He advised that the rails do not line up on many windows and, as a result, it is impossible to lock them. Along with this complaint there is wind and water leakage.

(Vol. V, p. 65)

4. Cabinets: He mentioned instances of where cabinet doors were slightly out of alignment, screws

were missing from door handles and, in a few instances, shades did not match. While not big items, these were aggravating. More aggravating was the fact that F.H.A. requires polishable metal over ½" asbestos board for a cabinet when it is within 28" of a range top. This was called to their attention during their F.H.A. inspection on two recent models. Upon checking with the plant, they were advised that we did not furnish this fire protective board and, apparently, could not tell where these might be obtained. More aggravating, we did not show any interest in obtaining these for them. They did find the asbestos board at Kitchen Mart, but felt that we should have made the effort to furnish the item.

5. Gable Ends: On a recent

(Vol. V, p. 66)

F.H.A. inspection on two models, both were turned down because of waviness of gable ends along with other infractions. While, again, we have redesigned the gable end to eliminate this problem, they are fearful of repercussions on other existing homes. They state, too, that the use of batten strips would increase their costs.

6. Exterior Panels: They complained that, in several instances, exterior panels did not align properly which, in turn, resulted in a more difficult tape and spackle job. You are already aware of the problems we have had concerning dry-wall with this dealership. We have taken the position that their dry-wall installer is at fault which, of course, did not improve their dispositions.

7. Soffits: They stated that the method we use of ventilating in the soffits meets heavy buyer objec-

(Vol. V, p. 67)

tion. The ventilating screen is very obvious in this position and looks cheap to the buyer. You can see the truss, roof sheathing and it does not give the appearance of a quality house. Their salesmen have complained a great deal about this as an objectionable item on our houses. They would like gable louvers.

8. Nail Pops: The advised that they had instances of nail pops and, in particular, those occurring in the Cummings house. F.H.A. has demanded that they make certain corrections on this home and, at the present time, they have a time extension for replying to F.H.A.

9. Closet Doors: You are well aware of the problems we have had concerning closet door installation at Fortner's.

Fortner was quite frank in stating that some of the problems are of their own making—that they are not entirely

(Vol. V, p. 68)

blameless. Nevertheless, many of the items which he has listed are our fault and they all add up to the fact that here is a most disgruntled dealer and we are in serious danger of losing him. We can and have taken the position on several occasions that his workmanship is inferior, which may be true, but this will not solve our problem.

I advised Mr. Fortner that we have corrected many of the complaints that he mentioned—for example, the new post-formed top for curing the problem of counter tops. We have redesigned the gable ends. We are redesigning closet doors. We are investigating the possibility of casing the edges of the gypsum to avoid the tape and spackle problem. We are considering going

to a 6'8" closet door and even offered him the option of deleting closet doors, to which he replied that he wanted a complete package.

(Vol. V, p. 69)

I asked Mr. Fortner to prepare an estimate on the additional expenses he incurred as a result of our deficiencies and let us take a look at these. I did not indicate that we would accept any amount or settle for any amount. Rather, I asked for specifics and specific amounts so that we would do this but it would take a little while.

The most important item in our conversation was the fact that he has become convinced that his salvation lies in a $10,000 house and he is going to have this whether it is with us or with someone else. He indicated a willingness to 'Let bygones be bygones' if we could furnish such a product, even if it involved special pricing in the home package from us. I told Mr. Fortner that we must follow a one-price policy and, therefore, there can be no price concession, even though this might be

(Vol. V, p. 70)

a method of 'making up for past mistakes.'

As you know, Paul has been working on this price house with Fortner's organization and, at that time, felt that the lowest attainable price was $10,500. I expressed doubt that we can ever get another $500 out of the home package alone. Since this time, Paul has learned that the house which Fortner's competition (Swindler) had been offering at $10,000 was low-cost 221 and, with this possibility, we may be able to get closer to the $10,000 figure.

In summing up, there is no question that this dealership is quite dissatisfied and we face the possibility of losing him. We can take the position that much of his

troubles he brought on himself by his construction methods, yet I cannot help but feel that we are at least partially responsible. We should attempt

(Vol. V, p. 71)

to make an equitable settlement on extra costs incurred as a result of our mistakes. I will not know the figure we are talking about until he presents his specific figures. We must eliminate the causes for complaint, since in their present frame of mind every little item looms large now. Paul Grayson should know within the next week whether or not we can develop a home plan or package which will permit Fortner to build in the price range he indicated.

I intend to follow up with Mr. Fortner within the next week concerning these complaints, and have promised him to do whatever I can to correct the problems which I have outlined. I further stated that if we cannot improve or correct these items, I would be honest and frank about it and advise him of this, without any false promises.

Stanley J. Mack
Manager-Dealer Sales"

(Vol. V, p. 72)

Q. It was the policy of the Homes Division at that time normally—normally and in the case of Fortner Enterprises Incorporated not to pay dealers for labor and extra materials brought about as a result of defects in components of the House packages of United States Steel?

A. It was our policy at that time not to pay for labor for the replacement of material.

Mr. Anderson: All right; that's all, Your Honor.

Mr. Reutlinger: If Your Honor please, because of the Witness' plans for next week I would like to take him as if on direct examination as our witness.

By the Court: All right.

Mr. Reutlinger: Which would of course, entitle Mr. Anderson to cross-examine on points.

By the Court: All right.

Direct Examination

By Mr. Reutlinger:

Q. You read a moment ago, I believe, Mr. Mack from that memorandum of May 3, 1962. Let me preface my

(Vol. V, p. 73)

question to you on that with another question; I know we had a great many people from time to time out at Golden Meadows, but were you ever personally ever at Golden Meadows Subdivision during the Fortner episode?

A. No sir; I never have been.

Q. Do you have any personal knowledge by actual inspection of any of the defects out at Golden Meadows that Mr. Fortner talks about?

A. No sir; I do not.

Q. The memorandum, I believe, from which you just read outlines in detail complaints made to you by Mr. Fortner?

A. That's right; I was reporting what Mr. Fortner stated to me were his complaints.

Q. All right sir; in the memorandum I ran across the name of Paul Grayson. Can you tell us who he was or is?

A. Paul Grayson at that time was our sales representative and he was assigned the Fortner account. He was servicing that account.

Paul Grayson is no longer with U.S. Steel Homes Division.

Q. Can you tell us very briefly the circumstances of his leaving and his present whereabouts the

(Vol. V, p. 74)

best you know or recall.

A. Uh, yes sir; Paul suffered physical and mental problems and he was relieved of his sales responsibilities and he was placed in the Engineering Department for a while as a draftsman and his condition continued to deteriorate and finally, I believe he received a medical disability—he is no longer with us.

Q. Have you seen him since he has left the Company's employ?

A. No sir; I have not.

Q. Do you know where he is today?

A. I do not. I have heard that he is in a mental home, but I don't know.

Q. Now, getting back to this memo of May 3, 1962, did you yourself discuss with Mr. Fortner the $10,000 low-cost house?

A. Yes sir: I did.

Q. Did you discuss with him on more than one occasion?

A. No sir; that was the only occasion that I talked to Mr. Fortner, the time of the meeting that I am reporting here.

Q. How did you leave that matter with Mr.

(Vol. V, p. 75)

Fortner with regard to the prospect of producing for him a home package which would give him an overall unit house, lot, whatnot, at $10,000?

A. I told Mr. Fortner that based on the studies, the analysis that his people and Paul had made at the time, uh—

Q. (Interrupting) Paul Grayson?

A. Paul Grayson; that's right; that I doubted very much if we could get $500 out of our package that we were providing to Fortner alone, however, that we would review it. We could continue to study and come back to him and see if we were able to reduce—come up with a lower package price to Mr. Fortner.

Q. To your knowledge, did Mr. Fortner or anyone on his behalf ever submit, as you say, a specific figure on the claims arising out of the alleged shortcomings of the U.S. Steel Homes?

A. No sir; they—no specifics ever presented to me.

Q. Now, Mr. Mack, I direct your attention to two documents which have been previously identified as Defendant's Exhibits Nos. 16 and 17; 16 being a letter to Mr. A. B. Fortner, Jr., dated December 15, 1960, and

(Vol. V, p. 76)

17 being a letter to A. B. Fortner, Jr., dated March 28, 1961; those aren't yours, are they?

A. No sir.

Q. And ask if those two exhibits—are those two items copies of letters that you wrote Mr. A. B. Fortner, Jr.?

A. Yes sir, they are.

Mr. Reutlinger: I will ask that the copies which the Reporter has be offered in evidence as our Exhibit No. 16 and 17 indicated by number.

By the Court: Let them be filed.

(Whereupon the Defendant's Nos. 16 and 17 were received in evidence.)

Q. Directing your attention to Exhibit No. 16, briefly tell us the subject matter of that letter addressed to Mr. Fortner; did you write these letters?

A. Yes sir; I did.

Q. Go ahead.

A. 17 refers to—

Q. (Interrupting) No. 16.

A. Pardon?

(Vol. V, p. 77)

Q. Sixteen first.

A. You want sixteen?

Q. Let's go to sixteen first.

A. Sixteen refers to an advertising promotion program that Fortner Enterprises was going to use to introduce Golden Meadows to the housing market here in Louisville and referred to our participation with Fortner in the advertising expenses.

Q. What—was your participation mentioned in a monetary amount?

A. Yes sir.

Q. What was it?

A. It was one-third of his planned expenditure which was $9,000 for advertising alone. Our share of that then being $3,000, and he was going to expend $20,000 and also added to that was an additional $775 which he would receive under our cooperative advertising program at that time making a total participation—our total participation $3,375.

Q. Now, the $3,000 figure, from I gather, is a set sum. How did you arrive at the smaller figure of $775?

A. That was based on our cooperative advertising program which was available to all dealers

(Vol. V, p. 78)

and under this program the dealer received a reimbursement in the amount of $25 for each house that he had taken in shipment, but to obtain the $25 reimbursement, had to first spend $50.

So, in effect, what we are doing, was picking up half of these charges, of the $25 per house shipment.

Q. This is a regular program with all dealers?

A. Yes sir.

Q. In the advertising would you require the name of United States Steel Homes to be used?

A. Oh, yes sir; it was part of the requirement that the dealer advertise it as a U.S. Steel advertisement and with U.S. Steel on the deal.

Q. Did Mr. Fortner—I say Mr. Fortner, but did

Fortner Enterprises take advantage of the offer made by your letter under date of I think December, 1960?

A. Yes sir, they did.

Q. Which we have identified as Exhibit No. 16.

A. Yes sir.

Q. I refer you now to Exhibit No. 17 and tell the jury in a general way what the subject matter of that is; did you write that letter?

A. Yes sir; I did.

(Vol. V, p. 79)

Q. And tell me, or tell us generally the subject matter of that letter.

A. The subject matter of this letter refers to a spring promotion program that the United States Steel Homes was sponsoring throughout the entire dealer organization.

We did this in the spring and usually in the fall and under this program, why, United States Steel Homes would prepare a complete advertising program including radio scripts and so on and also pay for a portion of the advertising and this particular letter refered to the spring of 1961 promotion and explaining to Mr. Fortner what we were going to do in this program, and we were going to help his organization sell houses.

Q. Well, help is a relative thing. Can you tell the jury how much help you were going to offer in terms of dollars based on the letter you have got before you?

A. The letter doesn't specify a dollar amount, but looking at what we were going to do, it would be in the neighborhood of a thousand dollars.

Q. Would Mr. Fortner be required to also participate by matching it in some manner?

A. Yes, he would have to run advertising

(Vol. V, p. 80)

as well.

Q. In that advertising would you require that the United States Steel Homes be identified?

A. Yes sir; in any advertising that we participated in it would have to be.

Q. Well, that makes sense. Did Mr. Fortner take advantage of that offer in the spring of 1961?

A. To the best of my knowledge, yes.

Q. Now, you mentioned the spring and fall advertising a moment ago. Was this a regular thing with your Homes Division?

A. Yes sir.

Q. At that time?

A. At that time it was.

Q. And that period.

A. (Witness nodded head affirmatively).

Q. Do you have any record of offering the same advertising to Mr. Fortner in the fall of 1961?

A. No sir; not that I know of.

Q. Can you tell us how that was accomplished with your dealers?

A. Well, normally, announcements concerning the promotions were sent out to the dealers in the way of a general announcement.

(Vol. V, p. 81)

As a matter of fact, a series of announcements would go out, one announcing it was coming or a series of letters, announcing, but they were form letters to all of them.

I think in the case of spring promotion the reason for the letter was at that time the Fortner organization was just new with us and we were trying to emphasize the help that we could give them.

Q. You have anticipated my question. Why did you write the letter when it was irregular, and the answer is that Mr. Fortner and his project were new to you.

A. Yes sir.

Mr. Reutlinger: I believe that's all for this witness.

Mr. Anderson: I have nothing further, Your Honor.

By the Court: You may stand aside.

* * * * * * *

(Vol. V, p. 83)

Whereupon at this point the witness A. B. FORTNER was recalled to the stand as if on cross-examination and the following proceedings occurred:

By Mr. Reutlinger: (Continued)

Q. Mr. Fortner, if you would, get your Exhibit No. 27 and I believe that is that statement that referred to the B-144 basement.

(Whereupon the witness did as requested.)

Q. As a matter of fact, you can turn to that basement page which will be much quicker and I will ask you what you show for lumber on that style basement?

A. $766.00.

Q. I show you an invoice from Cook Lumber Company on Lot No. 307 which has billed you for material on a B-144 basement in the amount of $768.39 and ask you if this appears on the lumber company's statement that amount?

A. Yes sir.

Mr. Reutlinger: Ask that this

(Vol. V, p. 84)

be filed as our Exhibit No. 111.

By the Court: Let it be filed.

(Whereupon an invoice of the Cook Lumber Company, dated June 20, 1961, in the amount of $768.39 was marked for identification as Defendant's Exhibit No. 111 and received in evidence.)

Q. If you would, look at your basement for a B-1 slab and tell the jury what the figure is—all your basements are on this page.

Mr. Hamilton: Couldn't be a basement.

The Witness: You said a B-1 slab?

Q. There is not a basement in a B-1 slab is there?

A. Not too easy.

Q. No sir; it's not; that's my fault and you are right. Look on your B-1 basement estimate which is from your Exhibit No. 27 and tell the jury what the projection is for lumber there.

A. $76.06.

(Vol. V, p. 85)

Q. I show you a photostat of a statement on Lot 118 from the Cook Lumber Company and ask you to tell us what amount is on that statement?

A. $546.39. Of course, we said yesterday that could be for a lot of things, storm doors.

Q. Yes sir; I know that. I understand. Let's file this one as 112.

By the Court: Let it be filed.

(Whereupon an invoice of the Cook Lumber Company, dated July 10, 1961, in the amount of $546.39, was marked for identification as Defendant's Exhibit No. 112 and received in evidence.)

Q. Now, you did bring up a subject, Mr. Fortner; you said it could be for storm doors or anything?

A. I just have no idea what it's for.

Q. I understand; but there is a several hundred dollars discrepancy between the projection shown on that sheet for lumber for basement and the bill, of course, isn't there?

A. That's not—I can't say that's a lum-

(Vol. V, p. 86)

ber bill.

Q. I understand that.

A. This lumber bill against that material bill?

Q. Yes sir.

A. That's right.

Q. There's a discrepancy there?

A. (Witness nodded head affirmatively.)

Q. Where else would you find a requirement for that much lumber or material in your projection on a B-1 house? In other words, what would Mr. Cook be billing you for in your projections here except for lumber or, as we showed yesterday, a few incidentals, like $7.00 or $4.00, things like that?

A. I don't know; it's—the bill don't say what it's for.

Q. I understand, but where—what could it be for in that large amount of several hundred dollars?

A. I don't know—don't know what it's for; have no idea.

Q. Have no idea. Do you have any idea where it is in the projection or estimate you have made?

(Vol. V, p. 87)

A. No, I don't.

Q. All right; I show you a statement of Cook Lumber Company, their letterhead, regarding Lot 21, which purports to be billed for lumber and material, B-1 basement, which has an extraordinarily large sum, and then gives you a credit, and I believe the original bill was $733, but they credit $153 on there?

A. Yes, they credited that—they credited $580; in other words, the bottom of it says $153.33.

Mr. Reutlinger: I see. Well, let's let it be filed.

By the Court: Let it be filed.

(Whereupon an invoice of the Cook Lumber Company, dated February, 15, 1961, in the amount of $153.33, was marked for identification as Defendant's Exhibit No. 113, and received in evidence.)

Q. I show you another estimate for Lot No. 61 of the Cook Lumber Company, their letterhead, which purports to bill you for $546, material for a B-1 basement in the amount of $546; is that correct?

A. That's what it says.

(Vol. V, p. 88)

Q. And it has been approved for payment and a check issued, I believe, check No. 839, it looks like; is that right?

A. Yes.

Mr. Reutlinger: Offer that.

By the Court: Let it be filed.

(Whereupon an invoice of the Cook Lumber Company, dated July 24, 1961, in the amount of $546.39 was marked for identification as Defendant's Exhibit No. 114, and received in evidence.)

Q. I am showing you a group of these now, Mr. Fortner, for Lot No. 190, Lot 28, Lot 185 and Lot 84 and ask you if these four aren't all on the Cook Lumber Company letterhead and if they aren't all for material for basements and if they aren't all in the amounts varying from $500 to $600; somewhere thereabouts?

A. That's right.

Q. Well, look at your basement projection again and see if you can find anything on that for lumber exceeding $76.60?

(Vol. V, p. 89)

A. Not for lumber.

Q. Do you find—read the items in your basement projection down that list, what they are, right there.

A. Concrete, plumbing, heating, electrical, lumber, excavating, carpenter work, painting, package, permit.

Q. And that's it, isn't it?

A. Yeah.

Q. Does Mr. Cook or the Cook Lumber Company Mr. Miles, furn[illegible] anything?

A. This [illegible]—and on here it's got another lumber list underneath it there.

Q. Yes sir; where is that?

A. Right here, for the porch.

Q. That's for the porch and that has nothing to do with the basement.

A. Well, that's not all that is on there.

Q. Well, I'm speaking purely of lumber for the basement.

A. Why, I read all—all this painting and that.

Q. Yes sir. Now, does the Cook Lumber Company, Mr. Fortner, furnish you—or, did it on this

(Vol. V, p. 90)

occasion furnish you any concrete work?

A. I don't remember how it was broken down at the time.

Q. All right; did they do any plumbing work?

A. No, I know they didn't do any plumbing work.

Q. Did they do any lighting work for you?

A. I don't know that they did, no.

Q. Did they do any electrical work?

A. Not to my knowledge.

Q. Did they do any excavating and rough grade?

A. I think they did; had charge of—

Q. (Interrupting) Charged for that?

A. Had charge of some of that.

Q. Did they charge it and actually bill you for it?

A. Mr. Miles handled it. I—how it was handled, I don't remember.

Q. Materials?

A. I don't remember.

Q. Would this be customary, to build, excavate and—

(Vol. V, p. 91)

A. (Interrupting) Well, when he gets on the stand he will have it item for item, penny for penny, where it went, upstairs, basement, downstairs.

Q. I know, Mr. Fortner, but I—

A. (Interrupting) You want me to say something I don't know.

Q. If you don't know that's a good answer.

A. I just told you I didn't know; this is an estimated cost.

Q. I know, I know it is, and you don't know.

A. It is not dated and I don't know when it was estimated or—

Q. (Interrupting) Oh yes, it is; you've already told us; this is your exhibit. Didn't you tell me and didn't you tell Mr. Anderson that that was prepared before you went in to this project?

A. Sure, but I don't know whether it's the last one or not. I don't know until—

Q. It's the only one we've got before the Court.

A. The one we built the houses, what it cost to build the houses, we have that. I think when you get to that you will find it different.

Q. Maybe, Mr. Fortner, I am confused. I

(Vol. V, p. 92)

thought that this exhibit you have in your hand—

A. (Interrupting) This is an estimated cost.

Q. (Continuing)—was your estimate.

A. And when and how it was done and just without Mr. Miles, the man that really went out and got all these bids and things, I just don't know.

By the Court: Is this the estimate you have testified from on direct examination?

Mr. Reutlinger: Yes, Your Honor.

The Witness: Yes sir; it's an estimate, yeah.

By the Court: You didn't prepare that?

The Witness: Well, we prepared it, our auditor.

By the Court: Do you stand behind that estimate or do you question it?

The Witness: I cannot take a bill from where it says material and it's lumber. I don't know; it's been too long ago.

By the Court: I'm talking about the estimate.

(Vol. V, p. 93)

The Witness: Yes.

By the Court: Now, you answer my questions. Do you stand behind that estimate?

The Witness: As an estimate; yes sir.

By the Court: Was it made before you went into this operation?

The Witness: Yes sir.

By the Court: All right. Now then, you answer the questions that he asks you about that estimate; it is yours.

The Witness: All right sir.

Q. Well, I may be repetitious, Mr. Fortner, but it is my impression that you told us, and when I say "us" I'm speaking of everybody in this courtroom, that you, Mr. Miles and your auditor, and I think you said perhaps on some items of it that Mr. Clements Smith, if I have the right name, assisted in the preparation of that estimate.

A. Earl Smith.

Q. Earl Smith?

A. Yes.

Q. Now, didn't you tell us that yesterday

(Vol. V, p. 94)

or the day before?

A. Yes, that's right; that's right; made an estimate, yes.

Q. And it was true, wasn't it?

A. They worked on it. When you're putting it together you have estimates from this contractor and the contractor and this contractor and all.

Q. I'm aware of that.

A. All I know is that in the final analysis, we built the houses and they varied because they were estimates and we were out some.

Q. I couldn't agree with you more.

A. Yeah. Well, that's all that's confusing me. I am not wanting to argue with you.

Q. Well, I don't mind because I make a living arguing so it's all right, but my—my point was simply that this is the estimate on which you projected your profits; is that true?

A. That's right.

Q. All right; and this is the final one and the last one and the one you started to work with just before you signed the contract, and first contract with the U. S. Steel people?

A. I can't remember if it's the only esti-

(Vol. V, p. 95)

mate we worked on.

Q. No, I didn't—I didn't say that, Mr. Fortner. I said this is the final one. If you didn't work on it more than once I don't see how you can be as successful as you are; I concede that. So, my question is, is this the final estimate, the one you went into this project with? Is this the one you used when you ascertained that you or your Corporation intended to make this profit before you signed that first contract with the Steel Corporation?

A. I assume it is because it's one before the Court; I'm sure we—

Q. (Interrupting) You assume it is. Well, can we proceed on the basis that it is?

A. That's right; right.

Q. All right; now, Mr. Fortner, you recall many years ago I sent over to Mr. Anderson a set of interrogatories which are questions, written questions, which required you or someone on your behalf, although I think you signed them, to furnish us certain information in preparation for the case and the trial generally and, uh, if you like, and you are surely entitled to do it, you are entitled to see the copy.

A. That's right; all right.

(Vol. V, p. 96)

Q. I am going to the interrogatories and if you will look in your yellow book it's page 130 and it's about oral complaints.

The question addressed to you, in writing, and sent directly to your lawyer at that time was this:

> "Q. Have any of the purchasers of the seventy houses made either verbal or written complaints or claims to Plaintiff concerning workmanship or construction as distinguished from the faulty or defective materials; if so, as to verbal complaints concerning workmanship or construction, give the name and address of each person making such complaint, the approximate date made and the substance of such. As to written complaints concerning workmanship or construction, furnish a copy of each such complaint with your answer to this interrogatory."

Now, over your signature you started out by answering that by saying:

> "Yes."

(Vol. V, p. 97)

Then, you tell us that certain of the purchasers have

made verbal complaints concerning workmanship and construction as distinguished from faulty or defective materials or components.

Now, let's stop here a minute, Mr. Fortner. The component parts or certainly some of them were furnished by the Homes Division; we know that, don't we?

A. Package, the Home package.

Q. The Home package; that's right; and, as I told the jury on the opening statement, nobody is perfect and we certainly could have in some instances furnished defective materials, however, what were your duties or what part were you responsible for in constructing, for example, a B-1 slab house?

Now, in broad outline,—I don't want you to drive every nail and plant every bush, but what did your people have to do what the U. S. Steel had no part of?

A. In the slab?

Q. In the slab.

A. Well, we, uh, had the lot surveyed and the house staked out and poured the concrete foundation and concrete slab, uh, with the heating and plumbing in and the wiring.

(Vol. V, p. 98)

Q. Did you furnish the furnace?

A. Yes.

Q. Except for specially ordered, did you furnish kitchen fixtures?

A. Kitchen fixtures?

Q. Like a range, G.E. range or washer?

A. We furnished—bought some through U. S. Steel.

Q. I say, with the exception of special orders, did you furnish them?

A. Uh-huh.

Q. Did you sometimes not furnish them at all?

A. Yes.

Q. Depending on what the customer wanted?

A. Right.

Q. Every package did not have an appliance from Steel Homes?

A. That's right.

Q. All right. Was it your responsibility to have the plumbing installed?

A. Yes sir.

Q. Was it your responsibility to complete the plumbing, septic tank, sewage disposal?

(Vol. V, p. 99)

A. That's the same question. We had the plumbing, all of the plumbing.

Q. Well, you included—

A. (Interrupting) We included that, yes.

Q. And your answer was all-embracing the first time?

A. Yes.

Q. I'm sorry. Was it your responsibility to put the flooring in?

A. Yes sir.

Q. Finish the flooring?

A. Yes sir.

Q. Painting?

A. Whatever it needed to finish it.

Q. I mean—yes.

A. Well, some we didn't paint; some we put down tile, depending on whether it was a slab or hardwood.

Q. I see. Well, depending on the type then?

A. Yes.

Q. It was your responsibility to either paint or put down the tile?

A. Finish it, un-huh.

Q. All right; finish it. In a basement-type

(Vol. V, p. 100)

house was it your responsibility to prepare the forms, for the concrete, provide the basement?

A. Yes sir.

Q. None of this was the Steel Corporation, was it?

A. No sir.

Q. You understood then what the question was when it was addressed to you by these interrogatories, didn't you?

A. Yes sir.

Q. You know what I was shooting at; all right; then, you continued and these complaints are identified below by lot number and the names and addresses appear in response to interrogatory 3 above and you gave me the answer as well as, where the exact date, as I suspected, of the verbal complaints were not known, and I am going to read these by Lot number and anythime I read something that is not your responsibility, you tell me.

Now, Lot 212, kitchen tile; this is yours, isn't it?

A. Yes sir.

Q. Before I get any further, did you go over these answers with Mr. Anderson and Mr. Hamilton before

(Vol. V, p. 101)

you signed them?

A. I don't know where that come from offhand.

Q. I understand that.

A. But I have a list of all the complaints that we went around and personally talked to the people.

Q. Yes.

A. My Sales Manager and I, we have a list of all of what connected with U. S. Steel at the top of this page and at the bottom of the page here in Mr. Mudd's handwriting we have a list of what we caused, or at least their complaints about it.

Q. I understand.

A. Listed on every house that was built.

Q. The complaints; that's fine; did you furnish this list to your Counsel, your lawyer?

A. Yes.

Q. Lot 211, kitchen tile, foundation, stucco, leak in sink and tub?

A. Wait a minute, let's go slower.

Q. All right; I'm sorry. Lot No. 211, kitchen tile, foundation stucco, leak in sink and tub, trees dead.

(Vol. V, p. 102)

Lot 208, rear walk.

Lot 389, fill dirt over septic tank.

Lot 190, basement leaks, pop-off valve on water heater.

Lot 188, doorbell, clean brick, trees dead.

A. I believe the doorbell was U. S. Steel; I'm not sure.

Q. Not sure; well then, you made a mistake by putting it on this list, didn't you?

A. I'm not sure. I just—the thought come to me.

Q. All right; clean brick, trees dead, basement leaks, fill dirt over septic tank.

Lot 187, quarter-round in living room.

Lot 186, kitchen floor, bathroom floor.

Lot 195, kitchen floor, bathroom floor, shrubs, repair front sidewalk.

Lot 182, trees dead.

Lot 202, lower septic tank, pipe vent, valve handle on water heater.

Lot 80, fix crawl opening, foundation stucco, hardwood floor, bathroom tile, heat deflector and cabinets, brace kitchen floor.

Lot 81, floor tile, fill dirt over septic

(Vol. V, p. 103)

tank, porch light, foundation stucco, trap door in garage.

Lot 82, shrubs and trees, bathroom leaks.

Lot 84, breather cap on septic tank.

Lot 410, bathroom drain.

Lot 50, shrubs, foundation stucco.

Lot 20, G. E. adjust button off, foundation stucco.

Lot 336, fill low spot in yard, fix crawl space, hardwood floor.

Lot 52, front stoop.

Lot 51, hardwood floor, bathroom, rear stoop.

Lot 66, adjust pop-off valve on water heater.

Lot 69, front walk, repair stone.

Lot 57, bathroom floor, adjust pop-valve on water heater.

Lot 363, refinish hardwood floors, foundation bolts need nuts, plastic covering underneath house.

Lot 59, broken tile in kitchen.

Lot 58, replace broken tile in kitchen.

A. Broken tile in kitchen, okay.

Q. Lot 58, replace some roof shingles.

Lot 62, valley tin in roof rusted, drain in

(Vol. V, p. 104)

bathroom.

Lot 63, kitchen floor tile.

Lot 67, replace a living room tile cracked, adjust furnace.

Lot 319, refinish dining room floor, concrete sill in garage, broken tile in kitchen, adjust furnace, roof flashing, basement leaks, kitchen table.

Lot 307, leak in basement, leak behind bath, holes in drive, family room floor.

Lot 60, kitchen floor, leak in basement.

Lot 217, paint bedroom baseboard, chrome guard on shower, furnace flu flashing.

Lot 209, door to attic.

Now, these you have told me are verbal complaints apparently that were made to you and you and Mr. Mudd

compiled and then you continue with your answer by saying that any written complaints—now, all those are verbal—which have been made and which are presently available to the Plaintiff concerning workmanship and construction are included in the documents referred to in answer to Interrogatory 3(C) above and are available to the lawyers for copying and of course I have gotten those.

Now, yesterday or the day before, and time is

(Vol. V, p. 105)

getting away from me, you told the jury about all these people coming into the sales office. I assume you were there and heard all this or some of it; you did, didn't you?

A. Yes sir.

Q. This wasn't what people had told you, was it?

A. No sir.

Q. All right; coming in, and I think you talked about gable ends and I have forgotten what else you said, but it was awful bad and all of this was from the U. S. Homes.

Did any of these people who had these complaints which you list with the exception of the doorbell, and we don't know what was wrong with it, which were your fault, did any of them ever come around to the sales office and mention this?

A. Yes, but most of those things you read there are just temporary things that you can take care of, like a tree dying or something of this nature. It's not a major factor that is wrong with the house that can't be corrected.

Q. Yeah; how do you correct a basement leak?

A. Basement leak is hard to correct and if

(Vol. V, p. 106)

you build a house you might have one.

Q. Unfortunately, I have done both.

A. It's not something you necessarily have done

wrong. You can get one crack and leak, but they do have several ways of fixing 'em, yes.

Q. I have built a house and I have got a leaky basement, so I know.

A. Yes.

Q. All right; those are difficult to correct?

A. They are; some things in there are difficult, but the majority of them are minor things like pop-off water heaters, or the back yard is a little bit—where the septic thing is put on, most of them are—

Q. Yeah, little nothings.

A. No, they'd have to be fixed; no, I won't say they are all little nothings.

Q. Well, how would you go about fixing a basement leak?

A. Well, there's a lot of different ways. There is different kinds of compound; you chisel them out—depends on how bad it is, how it's leaking.

Q. Now, these, how many basement leaks—

(Vol. V, p. 107)

of course you are at a disadvantage and I have got it here and so let me turn it up and your lawyer will follow me.

I believe you had three or four basement leaks reported to you just by word of mouth or at least that's what this list shows?

A. We went around from house to house and checked all problems too.

Q. I see. Well, I'll get back to my original question. Did any of these people who had made these complaints to you, come around to the sales office to make those complaints or did you reserve the sales office only for complaints about the Steel Homes packages?

A. I would imagine they made both kinds.

Q. I would think so, Mr. Fortner.

A. That's right.

Q. I think that's fair.

A. That's right.

Q. Can you tell us why you didn't the other day mention that the people had come around with these complaints also to your sales office?

A. I never had the opportunity, but I had my list ready to read of all complaints.

(Vol. V, p. 108)

Q. Mr. Fortner, I wasn't asking about the complaints. I was asking why when you were telling—

A. (Interrupting) Well, when we were talking—

Q. (Interrupting) Mr. Fortner, if you will, let me finish my question and we will go a lot faster. Can you tell me yesterday or the day before when you were testifying about the people coming into the sales office with complaints from the U. S. Steel Home packages why you didn't also tell the jury that at the same time they had other complaints that stem from your work and why they didn't come in the sales office with those?

A. I think we were talking about the package being bad and why—what was happening at the time.

Mr. Reutlinger: All right; that's a good answer. Now, Judge, it's awful late to go to another—

By the Court: (Interrupting) All right; it's a good time I think for us to adjourn for lunch. Ladies and gentlemen; remember the admonitions of the Court and be back at one-thirty.

(Whereupon at about the hour of twelve noon a recess was

(Vol. V, p. 109)

taken for lunch, reconvening at about the hour of 1:30 P.M. and the following proceedings were heard:)

Testimony of Mr. A. B. Fortner, Jr.

Cross-examination continued

By Mr. Reutlinger:

Q. Mr. Fortner, when we discontinued on yesterday you and I were discussing in some detail, and item by item, some of the financial information taken from the closing sheets; I think you recall that?

A. Yes sir.

Q. And the Court suggested that Counsel see if they could get together to shorten it and this is going to be very easy cross-examination if you will be patient.

I will work with these figures and Mr. Anderson will follow them and we will just simply read them into the record and then we will get into other matters.

I believe we closed with Lot 70 and that's a B-1 slab and the discount planned is $300 and the discount taken is $219 and there was $216 closing costs.

Mr. Anderson: $261.00.

Q. $261.00; thank you. See, that's where I transposed against myself. I didn't want to do that

(Vol. V, p. 110)

again, thank you.

Lot 66, B-1 crawl. Discount planned, $300; discount taken, $236; $300 closing costs.

Lot 323, B-144; discount planned, $400; discount taken, $314.

Lot 69, B-23 crawl; discount planned, $350; discount taken, $257. Closing costs $315.

Lot 65, B-1 slab; discount planned—apparently none taken; closing at Portland for $111 closing costs.

Mr. Anderson: Excuse me, Mr. Reutlinger; you didn't read the amount of discount planned.

Mr. Reutlinger: Didn't I say $300?

Mr. Anderson: No, you just said "discount planned".

Testimony of Mr. A. B. Fortner, Jr.

Mr. Reutlinger: $300, and not taken.

Mr. Anderson: Yes.

Mr. Reutlinger: Lot 62, B-1 slab, discount planned, $300; discount taken, $498; closing costs, $218.

Lot 104, discount planned, $300; discount

(Vol. V, p. 111)

taken, $224; closing costs, $293.50.

Lot No. 63, B-1 crawl; discount planned, $300; discount taken, $345; closing costs, $271.50.

Lot 307, B-144 basement; discount planned, $400; discount taken, $567; closing costs, $347.

Lot 58, B-1 slab; discount planned, $300; discount taken, $237; closing costs, $278.50.

Lot 363, B-111 crawl; discount planned, $350; discount taken, $277; closing costs, $305.

Lot 59, B-144 crawl; discount planned, $400; discount taken, $272; closing costs, $160.00.

Lot 67; discount planned, $300; discount taken, $446; closing costs, $231.50.

Lot 319, B-144; discount planned, $400; discount taken, $310; closing costs, $331.50.

Mr. Anderson: Excuse me, Mr. Reutlinger; I hate to keep interrupting you.

Mr. Reutlinger: I wish you would; I am notoriously poor with figures; go ahead.

Mr. Anderson: Up on No. 67 you said $230 something, I think.

Mr. Reutlinger: $271.50.

Mr. Anderson: Well, you said $231.50, I'm sure and it should have been $271.

(Vol. V, p. 112)

Mr. Reutlinger: That's right; that was the closing cost.

Lot 319, B-144, discount planned, $400; discount taken, $310; closing costs $331.50.

Lot 79, B-111, discount planned, $350; discount taken, $252; no closing costs.

Lot 118, B-1 basement, discount planned, $300; discount taken, $224; closing costs, $268.50.

Lot 208, B-1 crawl, discount planned, $300; discount taken, $231; closing costs, $272.

Lot 220, B-1 crawl; $300 discount planned; discount taken, $218; closing costs, $265.

Lot 83, B-1—

Mr. Anderson: Excuse me; it is $260—

Mr. Reutlinger: (Interrupting) $260.50.

Mr. Hamilton: Right.

Mr. Reutlinger: B-1 slab, Lot 83, discount planned, $300; discount taken, $553.10; closing costs, $263.

Lot 71, B-111, discount planned, $350; discount taken, $420; closing costs, $330.

Lot 367, discount planned, $400; no discount

(Vol. V, p. 113)

no closing costs.

Lot 21, B-111 basement, discount planned, $350; discount taken, $524; closing costs, $301.60.

Lot 60, discount planned, $300; discount taken, $259; closinug costs, $300.

Lot 305, B-23 crawl, discount planned, $350; discount taken, uh, I can't read my own writing, which is typical; it looks like $235; closing costs, $225.05.

Lot 64, B-111 slab, discount planned, $350; discount taken, $458.40; closing costs, $271.

Lot 710, B-23 crawl, discount planned, $350; no discount taken; no closing costs.

Lot 68, B-1 slab, discount planned, $300; discount taken, $436; closing costs, $260.50.

Lot 80, B-1 crawl, discount planned, $300; discount taken, $460; closing costs, $251.50.

Now we go to the second sheet and all of these—well, I

can get in the record by another thing, but they are in chronological order of the closings and the exhibits supporting this are already in.

Lot 182, B-1 slab, discount planned, $300; discount taken, $436; closing costs, $240.50.

Lot 61, B-144 crawl, discount planned, $400;

(Vol. V, p. 114)

discount taken, $620; closing costs, $341.12.

Lot 190, B-1 basement, discount planned, $300; discount taken $466.40; closing costs, $256.50.

Lot 28, B-144 basement, discount planned, $400; discount taken, $316; closing costs, $305.46.

Lot 189, discount planned—that's a B-1 slab—$300; discount taken, $545.60; closing costs, $260.50.

Lot 215, B-1 slab, discount planned, $300; discount taken, $456; closing costs, $270.

Lot 27, B-23 slab, discount planned, $350; no discount, no closing costs.

Lot 186, B-1 slab, discount planned, $300; discount taken, $545.60; closing costs, $260.50.

Lot 187, B-1 crawl, discount planned, $300; discount taken, $580.60; closing costs, $272.50.

Lot 212, B-23 crawl, discount planned, $350; discount taken, $646; closing costs, $294.40.

Lot 211, B-11 crawl, discount planned, $350; discount taken, $625.60; closing costs, $286.50.

Lot 319, B-11 crawl, discount planned, $350; discount taken, $628.10; closing costs, $287.

Lot 176, B-1 slab, discount planned, $300; discount taken, $545.60; closing costs, $285.

(Vol. V, p. 115)

Lot 195, B-1 basement, discount planned, $300; discount taken, $740.60; closing costs, $289.70.

B-1 basement, that's on Lot 196, discount planned, $300; discount taken, $638.10; closing costs, $289.

Lot 26, B-1 slab; discount planned, $300; discount taken, $580.60; closinug costs, $232.50.

Lot 82, B-1 slab, discount planned, $350; discount taken, $638.10; closing costs, $289.

Lot 56, B-1 crawl, discount planned, $300; discount taken, $446.25; closing costs, $252.50.

Lot 389, B-1 slab, discount planned, $300; discount taken, $386; closing costs, $227.

Lot 217, B-11 crawl, discount planned, $350; discount taken, $437.50; no closing costs.

Lot 202, B-1 crawl, discount planned, $300; discount taken, $580; closing costs, $227.50.

Lot 401, B-1 crawl, discount planned, $300; disconnt taken, $406; closing costs, $232.50.

Lot 181, B-23 crawl, discount planned, $350; discount taken, $439.25; closing costs, $247.

Lot 209, B-1 slab, discount planned, $300; discount taken, $392; closing costs, $228.50.

Lot 25, B-1 slab, discount planned, $300;

(Vol. V, p. 116)

discount taken, $531; closing costs, $234.50.

Lot 84, B-1 basement, $304 discount planned; discount taken, $325; closing costs, $251.90.

Lot B-144, discount planned, $400; no discount taken, no closing costs.

Lot 205, marked as a B-502, and I am not quite sure what that model is, but it relates somehow to B-23 and on that basis it is estimated, discount planned, $350; discount taken, $470.75; closing costs, of $261.

Lot 477, B-23 crawl, discount planned, $350; no discount taken, no closing costs.

Lot 271 was identified only as a Rutland and that has several model variations. The range of discount planned was $300 to $400; and therefore I took it right down the

middle at $350; the discount actually taken was $504 and closing costs were $275.50.

Lot 192, B-11 slab, discount planned, $350; discount taken, $372; closing costs, $245.50.

Lot 185, B-1 basement, discount planned, $300; discount taken, $439.25; closing costs, $267.

Now, that completes that aspect, if Your Honor please, and I apologize to the jury and to the Court, but I have to get it in as you know.

Q. Now, I think maybe though, Mr. Fortner,

(Vol. V, p. 117)

maybe we have saved about an hour and a half for the record though. Now, the price list which was introduced and took off that table as your price list, or your Plaintiff's Exhibit 26, can you tell me—not necessarily when it was prepared but when did it go into effect?

A. Right after it started, I imagine; a little while after we started.

Q. Well, a little while is a relative term; would you say a month?

A. I don't recall exactly when it went into effect.

Q. Two months?

A. I'd say maybe a couple of months, just guessing.

Q. All right. Well, let's say two months, and when you say, "After we started", do you mean after you started making contracts or after you had first made the basic arrangement with the Steel Company?

A. After we, uh, opened our models.

Q. And that would be in March?

A. March of '61.

Q. March of '61?

A. Yes sir.

(Vol. V, p. 118)

Q. So that, uh, well, let's see; let's say you started sometime—sometime in March, so let's say April and May

are out and would this be effective then in the first day of June?

A. I'm not too sure.

Q. Would it be effective the first day of July?

A. I—

Q. (Interrupting) I was speaking now of 1961, now, of course, aren't we?

A. I believe it would be.

Q. All right. Now, I direct your attention to an exhibit I tendered in Court on Monday which I numbered as Defendant's Exhibit No. 71 which is Lot No. 68, and I direct your attention to our Exhibit No. 73 which is Lot 182, and our Exhibit No. 77, which is Lot 189 and our Exhibit 186—rather our Exhibit 80, which Lot 186 and our Exhibit 85, which is Lot 176.

Mr. Anderson: What were those exhibit numbers again?

Mr. Reutlinger: All right, yes, 71, 73, 77—

Mr. Anderson: (Interrupting) Just a second now.

(Vol. V, p. 119)

Mr. Reutlinger: Have you got 'em?

Mr. Anderson: I have got them all here.

Q. Counsel, who is there with you, Mr. Fortner, can help you and let's look at the purchase contract on Lot 186, and I am sure that Mr.—

Mr. Anderson: Which exhibit number is that?

Mr. Reutlinger: Maybe we can do it a little quicker this way; this is Exhibit No. 80.

Mr. Anderson: Okay.

Q. I think if you will look over your lawyer's shoulder or if he tells you to the contrary that the purchase contract there is for Lot 186—it's for a B-1 slab.

Mr. Anderson: Just a minute, Mr. Reutlinger; you don't have a purchase contract with this exhibit; all you have is the closing-statement.

Mr. Reutlinger: I'm sorry; there it is (Indicating).

Mr. Anderson: All right.

(Vol. V, p. 120)

Q. I am holding out on you. Let's clip it together right quickly. We have a great many papers and you can see every now and then we kind of get snowed under.

I think you will find that that is a purchase contract for a B-1 slab dated—

Mr. Hamilton: (Interrupting) You want to use this one, Al?

Q. I have got it, no; you are following; dated August 23, 1961, for $11,250; is that correct?

A. Yes sir.

Q. Now, let's look at Lot 176 which would be our Exhibit No. 85.

Mr. Anderson: Excuse me, Mr. Reutlinger, but let me check my copy of this contract as you go along.

Mr. Reutlinger: Yes. Is it still legible?

Mr. Anderson: Yeah, this was—the closing statement shows a lot more.

Q. The purchase contract, Exhibit No. 85, is for Lot 176, a B-1 slab, dated September 16, 1961.

Mr. Anderson: Again, you don't have with your exhibit the purchase contract.

(Vol. V, p. 121)

Mr. Reutlinger: Something wrong there; I had a lot of them—what do you have underneath that?

Mr. Anderson: That's the second part of the closing sheet, Mr. Reutlinger.

Mr. Reutlinger: I'm not fussing at you, Ken.

Mr. Anderson: Better not; it's not my exhibit.

Mr. Reutlinger: I'm sorry; I had 'em all together.

Mr. Anderson: I've got it here; see, we got them in that other stack.

Mr. Reutlinger: Yeah. I made a copy for my own use,

which is not very legible, but which you can look at. September 16, 1961. I can tell you where it is in your order; we keyed it to that. It's, uh, the forty-third down in your order.

Q. This purchase contract, 176, which shows a B-1 slab sold on September 16, 1961, for $11,250; is that correct?

A. Yes sir.

Q. Then look at our Exhibit No. 77 which would be Lot No. 189 and if you want to look down

(Vol. V, p. 122)

your it's No. 35 in your list.

Mr. Anderson: You don't have copies of the contracts with any of yours, Mr. Reutlinger.

Mr. Reutlinger: I put a copy of the contract with each one, which is what perplexes me, and clipped them together. I don't know what happened; that was Monday.

Mr. Anderson: What Lot number is this again?

Mr. Reutlinger: Lot No. 189, my Exhibit No. 77.

Q. This shows a purchase contract for a B-1 slab, I believe, dated August 19, 1961, at a cost of $11,250?

A. Yes sir.

Q. Now, look at our No. 73 and your No. 32.

Mr. Anderson: What is the Lot number?

Mr. Reutlinger: Lot No. 82.

Mr. Hamilton: That's your 73.

Mr. Reutlinger: Yes. That would be 32 down on your list, in order.

(Vol. V, p. 123)

Mr. Anderson: What is the date of that and maybe that will help me.

Mr. Reutlinger: The date of the contract is August 25th, 1961. I have got a photostat of it which I took before I put what you furnished me with my exhibit.

Mr. Anderson: The easiest thing would be to use that.

Q. And I'll ask you if that doesn't indicate the sale of a B-1 slab, contract date of August 25, 1965, for $11,250?

A. Yes sir.

Q. And I'll ask you to look at Lot No. 68 and have I done that; I think we've done that, haven't we?

Mr. Hamilton: No.

Mr. Reutlinger: Which is your Exhibit No. 33. Now, I know I had them because I've got pictures of them.

Q. And I'll ask if that doesn't show the purchase contract for a B-1 slab August 4, 1961, in the amount of $11,250?

A. Yes sir.

Q. All right; let's do the best we can by resorting our papers and I will try to make order out

(Vol. V, p. 124)

of chaos over the weekend.

Mr. Anderson: Your Exhibits to which you referred are right here on the top.

Mr. Reutlinger: Yeah, don't have any contracts there at all.

Mr. Anderson: No, not in the five I have pulled out.

Mr. Reutlinger: Well, I'll not argue with you; they were there once.

Mr. Anderson: Well, they don't even have any holes in them; you didn't have them stapled.

Mr. Reutlinger: I have them somewhere; I have them stapled together. I'll find them.

Q. Now, if you would, one more time pick up your Exhibit No. 27 and that's the projection sheet for projection estimate.

(Whereupon the Witness did as requested.)

Q. And I believe you will find that you projected interest costs on a completely uniform basis at $300 no matter what type of unit was involved.

A. Yes sir.

Q. And if my arithmetic is right and if you

(Vol. V, p. 125)

are working with two nineteen units, which we are, and I emphasize again if my arithmetic is right, you expected to pay, based on that projection, something in the neighborhood of $65,700 in interest and I will have to ask Mr. Hamilton to assist me with that, but if my arithmetic is right you expected to pay two hundred and nineteen times three hundred?

A. Yes.

Q. All right; after the first day of June, 1962 do you know how much interest you actually paid?

A. No sir.

Q. Mr. Cooper, I feel sure can furnish that answer?

A. Yes sir.

Q. I'm going to suggest that the interest paid was in the neighborhood of somewhere between $20,000 and $30,000; does that sound about right, again not trying to pin you down.

A. I wouldn't attempt to say.

Q. All right; that's all right. We will move on. Now, let's go back to the defective, and I hate to use that word because I'm not convinced of it, but the alleged defective condition of the merchandise furnished by the Steel Homes Division.

(Vol. V, p. 126)

I believe you told us on direct examination that from the word go you observed and there was reported to you defects in that material coming over from New Albany; is that true?

A. Yes sir.

Q. Now, of your own observation and not what someone told you, tell us what you first saw and when.

A. What I first saw was the roof going on the first model.

Q. This was the first thing we sent you?

A. Yes, first thing.

Q. Now, about when was that and I am not trying to pin you down to a precise date.

A. Well, the models were open in March, the 26th, I believe has been established.

Q. Yes sir.

A. But I imagine it was a couple of months before that.

Q. All right; say early in the year of 1961?

A. Yeah, I assume that; I'm not positive.

Q. Sir?

A. I'm not positive.

Q. I say, I'm not trying to pin you down to

(Vol. V, p. 127)

a precise date. In any event, and you have, in response to some interrogatories, No. 112—go a little farther, 118, and these are the same type written questions, that we spoke about before lunch, Mr. Fortner, and this interrogatory was asked you and it went this way:

"List separately under each of the seventy homes in specific detail the items in each home furnished by the U.S. Steel Corporation alleged to be faulty and defective."

And you answered in this manner:

"Plaintiff contends that the U. S. Steel Corporation furnished for each of the seventy homes defective drywall."

Now, that's for all seventy of them, isn't it?

A. Yes sir; each.

Q. Each one; windows, each one?

A. Yes sir.

Q. Doors, each one?

A. Yes sir.

Q. And then of course you say that in many of the homes the cabinet tops, screens and gables, and

(Vol. V, p. 128)

then in addition to that you list in each one down the line again, drywall panels and gables and in most of them, closet doors and in isolated instances we have things such as closet door trim not furnished, closet door trim not furnished on two occasions and kitchen cabinets sag, but these are exceptions to this list of general, alleged defects common to every package sent you; is that right? Would you like to look at this?

A. No, no; that's right, whatever that says.

Q. All right; of course this is a matter of record.

A. Yes, that's right.

Q. Well now, I believe you told us that you—I get confused here because you've told me a minute ago that you observed these defects from the word go from the first packages right down to the last package; is that right?

A. Yes sir.

Q. All right; and you have worked with some shortages?

A. Yes sir.

Q. Did you have any pilferage out there?

(Vol. V, p. 129)

A. I believe there was some.

Q. Well, can you differentiate between a claimed shortage on our delivery and material not being there when the men went to put it up; how do you account for the difference? How do you determine that?

A. The builder can answer that better than I.

Q. I see.

A. But as to what I know about it, when they'd unload it they would check it.

Q. All right; do you know what the causes were of

these defects that you claim came from the Homes Division, what caused, for example, the wavy gable ends?

A. Well, my opinion—

Q. (Interrupting) Well, that's—that'll be all right.

A. Be the studs that held them together was too far apart and too small and plus the plywood itself was too thin.

Q. I'm speaking of the gables.

A. That's what I'm speaking of.

Q. Yes sir; suppose they had not been nailed properly—installed properly; would this cause 'em—

A. (Interrupting) I guess that's possible.

(Vol. V, p. 130)

Q. All right. Now, we have talked at some length about counter tops, sink tops, uh—

A. Kitchen cabinet tops.

Q. Yes, kitchen cabinet tops. Now as I understand it, there was furnished a formica or some so . of a synthetic top.

A. Un-huh.

Q. With a splashboard along the back?

A. Yes sir.

Q. And it was rougly this manner (Indicating) as these two books are?

A. Yeah.

Q. And we know that some of them swole up because of—apparently because of moisture—for some reason they swole up.

A. When they would get to using them they swelled up and cracked apart.

Q. Right, yes; and, of course, the natural assumption is that moisture, uh, the lady of the house working with the counter top would cause it to swell up. You have

seen that happen, haven't you? Won't wood swell when it is wet?

A. Yes, it will; yes, as a rule.

(Vol. V, p. 131)

Q. What would cause the seal to break or what are some of the causes of the seal failure between the upright portion and the shelf portion?

A. I really don't know what make 'em do it; they did do it.

Q. I understand that; I mean, what would cause the seal to break that would permit the moisture to get in there, or do you know?

A. I don't—they wasn't sealed; that piece was nailed on the back.

Q. But there was no seal there?

A. It wasn't post-formed.

Q. I didn't say it was post-formed, but was it sealed or do you know?

A. It was just nailed on the back.

Q. No seal there at all?

A. To my knowledge I can't remember one.

Q. I see; could that have been jarred or broken apart when it was unloaded and dropped, perhaps through carelessness, and then the seal broke and the moisture—could this have happened?

A. Well, they had to renew 'em, oh, two, three times in some homes. I don't know that they dropped every one of them.

Q. Could it have happened?

(Vol. V, p. 132)

A. I guess you could drop anything and break it, sure.

Q. Who would do the unloading, Mr. Fortner?

A. They would all help.

Q. Your people?

A. Yes.

Q. Did you have—this was an F.H.A. approved development, wasn't it?

A. Yes sir.

Q. Did you have F.H.A. inspection periodically out there?

A. Yes sir.

Q. By the inspectors that were approved?

A. Yes sir.

Q. Would they list the defects if any, and report them to someone in authority out there?

A. Yes, they always went around with Mr. Miles and inspected the property.

Q. Well, suppose Mr. Miles wasn't there; who did they go around with?

A. Go around by theirselves, I guess.

Q. Sir?

A. Go around with theirself or the next man in line.

(Vol. V, p. 133)

Q. Well, I know they would go around by themselves, but who would be the next man in line if Mr. Miles had not been there?

A. Mr. Robinson.

Q. He's—yes, I know who he is now, and I believe you have told us that each one of these houses was finally approved by the F.H.A. before closing?

A. We had gotten 'em ready before closing, approved, yes.

Q. Each one?

A. Yes.

Q. Without exception?

A. Every one that went under F.H.A. I am assuming this all did; I don't remember.

Q. All right; at least that's what you told me in your interrogatories.

A. I heard you say probably there a while ago; that's what made me—

Q. But each one these was approved by F.H.A. before it was—

A. (Interrupting) Every one closed was approved by F.H.A.; that's right.

Q. That's what you told me in your inter-

(Vol. V, p. 134)

rogatory.

A. Yes sir.

Q. This morning we talked with Mr. Mack some about the list of defects which he said you agreed to furnish with a specific cost item. I assume the reason that this was never furnished is because your testimony I believe, on Monday or Tuesday, when you said that you were able to talk to these people who were working, these people working for you, you were able to talk them into doing this extra work without making charges.

A. We did a lot of this, yes; that's what taken up a whole lot of time.

Q. Yes, and you never did furnish such a list, however, did you?

A. According to his letter I didn't. So, I guess I didn't; I don't remember.

Q. All right. Now, let's turn to a sheaf of exhibits, and I hope I've got these in there, which started our Exhibit No. 25 and which are some of the written complaints, and that's 25 to 39, both inclusive.

I think we touched briefly on verbal complaints this morning as a part of that answer, about the verbal

(Vol. V, p. 136)

complaints and reference was made to some written material, which you, through your lawyers, told me was available in your lawyer's office and which I picked up.

Now, let's look at Lot No. 78.

Mr. Anderson: Mr. Reutlinger, give me a couple of minutes.

Mr. Reutlinger: Sure, yes indeed.

Q. Mr. Fortner, I will read this and if Counsel will follow, if I make any errors in the actual language, and then I will ask you about them and you can answer from this. I am not above letting you look at them.

A. No, that's all right.

Q. But we do have a problem.

A. That's all right.

Mr. Reutlinger: First, I would like to introduce as Defendant's Exhibits, Nos. 25 to 39, both number inclusive, matters which on their face relate to various lots in Golden Meadows Subdivision and the written complaints about them.

By the Court: This filed in response to the interrogatories?

(Vol. V, p. 137)

Mr. Reutlinger: No sir; this was tendered to the Court on Monday as Exhibits by number and it is material obtained from Plaintiff's Counsel when he said, "You can come and get it."

By the Court: In response to the interrogatories?

Mr. Reutlinger: Yes sir, that's correct; I misunderstood the Court.

By the Court: All right; let it be filed.

(Whereupon Defendant's Exhibit Nos. 25 through 39 were received in evidence.)

Q. With the letterhead of the Federal Housing Administration, April 11, 1962, there is a letter addressed to Zettwoch-Fortner which I guess is an error and probably should have been addressed to your other corporation.

It has reference to Lot No. 478, Golden Meadows and reads:

"Mr. Charles B. Jackson called at this office and stipulated that there were a number of things wrong with this property which he wished

(Vol. V, p. 138)

to have corrected before the closing of the transaction. Our inspector examined this property on April 6 and makes the following remarks:

'No. 1. Cracks in drywall at corners in kitchen, hall and at corners of doors as pointed out by Mr. Jackson'."

Now, whose responsibility would that be?

A. I guess it depends on what made 'em crack.

Q. All right; you don't know?

A. No.

Q. Could be you or me?

Mr. Anderson: Excuse me, Mr. Reutlinger; I hadn't realized this until before, but Lot 478 isn't even a house that was built with U. S. Steel as far as I can determine.

Mr. Reutlinger: As far as I can determine it was; you had some houses which were not mortgaged to you.

Mr. Anderson: Well, it's not on this list here.

(Vol. V, p. 139)

Mr. Reutlinger: You gave me this paper.

Mr. Anderson: I know, and I didn't realize it until just this instant that it's not on any of the things.

Mr. Reutlinger: I got it from you is all I can say.

Mr. Anderson: Well, I guess so, but I don't—

Mr. Reutlinger: (Interrupting) It talks about Lot No. 478 in Golden Meadows.

Mr. Anderson: Okay, okay.

Mr. Reutlinger: And Jackson is one of your appraisers; I know that because you have given me his name.

Mr. Anderson: It must have switched lots; I think that is what happened; they must have switched lots.

Mr. Reutlinger: This could easily be.

Q. (Continuing) "No. 2. Tile cracked and buckled in kitchen."

Is that kitchen—is that your responsibility or mine?

(Vol. V, p. 140)

A. Give me that again.

Q. Tile cracked and buckled in kitchen. Whose responsibility is that, your or mine?

A. Ours.

Q. Yours?

A. Fortner Enterprises'.

Q. "No. 3. Drywall cracked along ceiling in several places."

I guess this is one of the "Either."

A. Uh, I—

Q. Okay; your choice; you tell me; I'm asking.

A. I think the drywall would be the U. S. Steel because they furnished it.

Q. "No. 4. Floor roughed by sander at register in front corner bedroom."

A. That would be ours.

Q. "No. 5. Floor face nailed and nails not set or filed."

A. Be ours.

Q. "No. 6. Filling out of cracks in floor at entrance doors."

A. Be ours.

Q. "No. 7. Plywood used for porch ceiling rough."

(Vol. V, p. 141)

A. Be ours.

Q. "No. 8. Floor finishing poor throughout, especially in closets."

A. I didn't hear all that.

Q. Floor finishing poor throughout, especially in closets.

A. That would be ours.

Q. 'No. 10. Threshold strip missing at garage entrance."

A. That would be yours.

Q. A threshold strip missing at garage entrance?

A. Well, it could be one of the shortages.

Q. Well, did you ask for one or did you—obviously—

A. (Interrupting) I don't remember that thing. We asked for something every day or two.

Q. You don't remember whether you asked for it or not?

A. No, I don't remember that.

Q. Either a shortage or pilferage; could be—

A. (Interrupting) Could be that.

Q. Either one. No. 11. Grout coming out

(Vol. V, p. 142)

between tile in bathroom."

A. Be ours.

Q. "No. 12. Hardwood floors split where nailed in kitchen."

A. Be ours.

Q. "No. 13. The floor joist under wall of living room has sagged causing the living room floor to pull away from the wall. Builder failed to shim under sill plate to hold it level. This was missed by inspector at time of final inspection because garage was used for household storage at that time and we want it fixed."

A. That would be ours.

Q. Turning now to Exhibit No. 26 which related to Mr. Keys, and keyed it to a lot number, but in any event, he is identified as one of your purchasers.

There is a form letter from the F.H.A. again addressed

to Zettwoch-Fortner and there is another letter which says that they want some follow-up materials and then they give you a construction complaint which is dated November 24, 1962 and it says:

"Chip out of front door."

Is that yours or ours?

(Vol. V, p. 143)

A. What date was that now?

Q. The date if November 24, 1962 and indicates the home occupied on May 26, 1962. It says, and I am reading now, signed by Mrs. Larry Keys:

"Chip out of front door."

A. Chip out of front door?

Q. That's what it said.

A. The door is furnished by U. S. Steel; now who made the chip I don't know.

Q. You don't know?

A. No sir.

Q. That could have happened to you or me at a later time; is that correct?

A. Yes sir.

Q. All right; let's put "either" by that; is that fair?

A. Fair.

Q. Bathroom drywall or paint is cracking in corner.

A. We had a lot of that.

Q. Well, whose is it?

A. U. S. Steel, drywall.

Q. How about the paint?

A. Well, the drywall—

(Vol. V, p. 144)

Q. (Interrupting) It said, "or paint."

A. Well, if it wasn't a drywall and paint only, why, it would be—just got to be ours.

Q. I am reading from it and it says, "drywall or paint;" that's a toss-up then, isn't it?

A. I don't know.

Q. Okay; let's toss that one up as even.

"The front bedroom window is broken."

Now, I know we furnished the windows, but you don't know when it got broken, do you?

A. I don't.

Q. You didn't break it so that's an "either" too, isn't it?

A. That's right.

Q. "Sealer is dripped all over walls in kitchen and bath."

A. Who?

Q. Sealer.

A. Yeah, that's right.

Q. Okay; "The furnace keeps lighting when thermostat is set on 74F." And that's you.

A. That's us.

Q. Now, there is a second page which is earlier, and I should have done it backwards, or I did

(Vol. V, p. 145)

it—I'm sorry; I got 'em together in reverse order. This is a direct letter to Zettwoch-Fortner again by Mr. Lee under date of July 11, 1962, which has some items on it which are scratched out, but it has, among the ones which are not, the same things which I have just read you, "Sealer is dripped all over walls and cabinets in kitchen and bath; bathroom drywall or paint is cracking and chip out of front door", and one that apparently was fixed, although it is still listed, "closet door needs paint touching."

A. I don't know that—whether that would be on the original paint or the paint we used.

Q. Well then, let's give it a toss-up and we mentioned some broken windows; your fault or mine?

A. I guess—after the subdivision was closed, wasn't it?

Q. I don't know; the F.H.A. letter is addressed to Zettwoch-Fortner.

A. Yes, yes, it would be.

Q. F.H.A. letter is dated November 28, 1962, however the letter from Keys is addressed July 12, 1962 and had you quit by then?

A. I don't remember what time we quit without checking.

(Vol. V, p. 146)

Q. Well, if you didn't get that letter from the Credit Corporation until sometime after July 12th, because the exhibit date is July 12th?

A. Uh-huh.

Q. So, you had quit by July 11th?

A. I just wondered.

Q. All right; then we look at Exhibit No. 27, which is over the signature of Mr. and Mrs. Ray and it's a very short letter and says:

> "I am writing in reference to house on Lot No. 195, Golden Drive, Golden Meadow Subdivision, Valley Station, Kentucky. The basement has been leaking since I took possession April 26, 1962. We have been waiting since then for your enterprises to take care of the matter."

That has to be you, doesn't it?

A. Yeah.

Q. All right; and now, Exhibit No. 28 over the signature of Mr. Wright and it is not dated and there is no particular order in these, I might advise you, Mr. Fortner.

(Vol. V, p. 147)

I put them together as I received them from Mr. Anderson. This says:

"Sir: I have three leaks in my basement and have been waiting since last summer to have these corrected. I have called, talked to and personally gave notes and letters telling about the leaks to the builders, salesmen and Mr. Fortner of the Zettwoch-Fortner Corporation. The only reaction I got was promises that it would be taken care of right away. I believe that I have given everyone plenty of notice and more than enough time to fix the leaks. I live at 10707 Golden Drive in the Golden Meadows Subdivision, Lot 190."

I am not going to give you three, but you certainly get one out of that, don't you?

A. That's right.

Q. Now, on Exhibit No. 29, which is handwritten note regarding Lot No. 80 in Golden Meadows Subdivision over the signature of Stephen M. Massie.

(Vol. V, p. 148)

It is a registered letter and I still can't find a date on the letter or the outside of the envelope, postmark, but it's from—well, I don't know, but it says—

Mr. Anderson: (Interrupting) There is—

Q. (Interrupting) The 29th, that is, apparently, but in any event there is no date on it.

Mr. Anderson: Well, on the envelope there is.

Mr. Reutlinger: It's from Cummings though.

Mr. Anderson: I'm sorry.

Mr. Reutlinger: "Lot No. 80; Golden Meadow Subdivision, Dear Sir: We are applying to you once again to get action on the following items.

No. 1. The hardwood floors have grit and sand under the finish;"

Now, that was yours?

A. Un-huh.

Q. (Continuing) "The bathroom floor has seams in it which is causing the tile to crack."

That's yours?

(Vol. V, p. 149)

A. Un-huh.

Q. (Continuing) "All closet doors will not stay on tracks."

A. I don't know.

Q. If there is dirt under those tracks or if they were improperly installed—

A. (Interrupting) The factory man couldn't fix it.

Q. Can you answer my question, Mr. Fortner?

A. I don't know.

Q. Then if you don't know you can answer it in that manner. Like I said, if you will answer my questions we will move along faster.

"Concrete walk in back yard cracked in two places."

A. Yes sir.

Q. (Continuing) Stucco cracking around foundation of house."

A. Ours.

Q. This next one is not signed, but this seems to have over it—it is written at the top Harold Poole, and it says:

"New glass for front door. The old

(Vol. V, p. 150)

one won't fit."

That has been scratched out assuming that it had not been scratched out whose was that?

A. Yours, I guess.

Q. Now, "New kitchen sink." We messed up a lot of sinks, didn't we.

"Light fixture in kitchen."

A. Who furnished them; I think U. S. Steel furnished them, but that doesn't say it made it bad. You don't know what was wrong with the fixture?

Q. Well, I have read you everything. He obviously didn't know. Well, "Fix drywall."

A. Fixed?

Q. No, "Fix drywall."; whose is it, yours or mine?

A. That gets back again to—

Q. (Interrupting) That's an "either".

A. Whether the nails was popping or what was the matter.

Q. It could be either then, couldn't it, yours or mine?

A. Yes.

Q. "Finish sodding."

A. Ours.

(Vol. V, p. 151)

Q. "Replace tree."

A. Ours.

Q. "Replace back sidewalk." And it has got in parentheses, "Cracked".

A. What is that?

Q. It says, "Replace back sidewalk" and in parentheses, "Cracked".

A. That's ours.

Q. Then, on Exhibit No. 31 it starts out with an F.H.A. form letter and it is addressed here to Mr. Herman Miles at 1514 West Main Street, Louisville, Kentucky, and I believe that is the address of the Cook Lumber Company?

A. Yes sir.

Q. It makes reference to a Mr. Woprice, R. J., and over Mr. Woprice's signature, dated October 11, 1962 it indicates

the home was occupied on October 6th, 1962, and it is addressed, as I have indicated, to Herman Miles, Cook Lumber Company, Agent, Zettwoch-Fortner Corporation, Pleasure Ridge Park, Kentucky and says:

"1. Drainage problem between house on corner and into my home. Also catch basin clogged with mud. Recommend grading and

(Vol. V, p. 152)

partial sodding(grading alone failed)."

That's yours?

A. Yes.

Q. "Concrete cracked; front walk; garage floor."

A. That's right.

Q. That gives you one there. Then it goes on to say, "Request made approximately one year ago." And then "Plaster where ceilings and walls meet is cracked approximately five or six places. (These are not small cracks.) There are also cracks in seams."

Yours or mine?

A. I'd say it's yours.

Q. You'd say it's mine; suppose your drywall man, Mr. Powell had miscued when he stapled and put those on; would some of that be his fault?

A. Well, it's possible.

Q. Well, I'm going to put U.S.H. on here, but I'm going to put a question mark on that when I talk to the jury about it a little later.

"Sink top is buckled." And I assume they meant by that that the formica is that we have been discussing and of course you think that's mine,

(Vol. V, p. 153)

don't you?

A. Yes.

Q. But if some of your people dumped it off the truck and broke the seal it could be yours, couldn't it?

A. I think they came pretty well crated up.

Q. I say it could be, though?

A. As I said before, anything, I guess, could happen.

Q. Well, I'll put myself down to take you out of it.

Now, here is another letter from F.H.A. dated November 2, 1962, over the signature of the Director and it says:

"On October 12th we wrote you and asked that you reply by October 25th."

And they hadn't heard from you and then scribbled on it is this notation which is supplemented by a typewritten letter of November 15, 1962 and the typewritten letter doesn't purport to show who signed it, but it indicates that it is the treasurer for the Fortner Enterprises Incorporated and that would be Mr. Miles, wouldn't it?

A. Right.

(Vol. V, p. 154)

Q. Or certainly at that time?

A. Yes.

Q. "None of this work has been completed but all has been arranged for and should be completed in the next two weeks at which time we will notify you."

Turn now to Exhibi No. 32 which are two, or a series of letters from a law firm here in town, Goldberg and Weber, and both apparently are written by Mr. Weber.

In this one you have got a whole lot of people getting letters, but this was addressed to Earl E. Smith, Zettwoch-Fortner Corporation, dated May 22, 1962, and it says that they represent Mr. and Mrs. C. Robert Crowley and;

"As you know, Mr. Crowley has made repeated requests to have certain defects corrected which have been present from the period of completion of the house. The builder, Harry Miles—"

And I guess he means Herman Miles because you didn't have any Harry, did you?

(Vol. V, p. 155)

A. No.

Q. All right. "Apparently has made some attempt to correct one or two of the defects, but this has not been satisfactory and many of the other defects have had no correction at all. Generally, the finish of the house is in extremely poor condition; specifically, some of the defects which must be immediately corrected are as follows:

1. The front door unit of the house needs to be replaced."

Your or mine?

A. Yours.

Q. Okay. "Throughout the house the joints where the drywall was installed are visible and the drywall is pulling away in some of the closets."

A. Yours.

Q. Mr. Powell couldn't have made any mistakes?

(Vol. V, p. 156)

A. I ain't saying he couldn't, but I assume it was, from my inspection, what little I knew about it, it was.

Q. Mr. Powell is a pretty good drywall man?

A. Yes sir.

Q. All right. "Baseboards in some sections of the house have already begun to pull away."

Speaking now of the baseboards.

A. I don't know.

Q. Well, I'll just put a "B.C."; how's that?

"The drainboard, which has been replaced twice is again warped," and this is—all right. I think you get the next one.

"The floor is separating near the front door."

A. Right.

Q. That is you, isn't it?

A. Yes.

Q. "Two trees in the front yard have already died."

A. We lost about twenty-five trees out there, planted them in the hot weather and some of them died and we replaced them.

Q. Where did you get those trees; do you

(Vol. V, p. 157)

know?

A. I don't know.

Q. Mr. Miles replaced them?

A. I think so.

Q. "Basement wall has already begun to crack. The representative for Bryant Furnace Company has told Mr. Crowley that the furnace is too small for the house and is not generating enough heat during the winter."

A. F.H.A. approved.

Q. I didn't ask you about that, about F.H.A. approval.

A. What did you ask me; I'm sorry.

Q. Whose furnace was it, yours or ours?

A. Ours.

Q. Okay. "The finished job on the floor and vinyl tile, among other things, is generally poor."

That's you, isn't it?

A. Yes, on the floor.

Q. And then he goes on, like the lawyer says, he has been so kind to you and your office and

(Vol. V, p. 158)

Mr. Miles is called upon to correct all this immediately.

Now, he follows this up, Mr. Weber does, with a second letter and this time it is addressed to Mr. Hamilton who was your lawyer at that time under date of September 14, 1962, and Mr. Weber says that his client tells him that the following still has not been done although he wrote you back in May of 1962:

"The finish job on the floors has never been corrected. The varnish is peeling off and the floors are generally in poor condition."

That's you, right?

A. Yes.

Q. "A new front door was hung but it has never been weatherized and the trim has never been painted since the hanging of door."

They got this new door from us, but you didn't come by and fix it up, did you?

A. According to that we didn't.

Q. Well, according to that.

(Vol. V, p. 159)

A. I don't know whether we fixed it or not.

Q. Well, I say, according to this. I wasn't there either.

A. Yes.

Q. That's right. "The vinyl tile is still separated and is in terrible condition for the short amount of time in which it has been installed."

That's you?

A. Yes.

Q. "The roofing is beginning to come loose."

Who was your roofer?

A. I don't know.

Q. That is you, isn't it?

A. Yes, but I don't know what you mean by "Coming loose."

Q. I'm reading it to you, I don't either. It says the roofing is beginning to come loose and the roofing is put on by your roofer, isn't it?

A. Right.

Q. "The wood is beginning to pull away under the eaves and the caulking is coming out."

(Vol. V, p. 160)

Who put the caulking in?

A. It wouldn't come out under the eaves; he's either talking about the end of the gable or—

Q. Who put the caulking in?

A. We had it put in several places.

Q. I understand that; you did. I'd split that with you that far.

A. If it had fit right we wouldn't have had to put any caulking in.

Q. You still don't want to split it?

A. No.

Q. Okay; that's—

"Repair work needs to be done on the garage rear threshold to stop water from flowing in."

That's you, isn't it?

A. That could—yes, I would say yes.

Q. "The trees in the front yard, which have died, have never been replaced."

That's you?

A. That's right.

Q. "They chipped the stucco away where the concrete was cracked and have never

(Vol. V, p. 161)

fixed it."

That's you also?

A. (Witness nodded head affirmatively.)

Q. "They painted the bathroom but have not finished the job."

That's you?

A. That's true.

Q. "The patio has begun to crack within the last three or four months."

That's you?

A. Yes. Now, getting back to this other, painting the bathroom, that could have been where we had to paint on the drywall that had cracked or something; I don't know. I'm just assuming.

Q. All it says here, Mr. Fortner—

A. (Interrupting) Says he painted but that we didn't finish it.

Q. No, no; he doesn't—let me read it to you again. It says that they painted the bathroom but have not finished the job.

A. Yes.

Q. That's what it says. Now, you had a crew of painters which were your people, didn't you?

(Vol. V, p. 162)

A. Yes.

Q. And it says here that they painted the bathroom but didn't finish it?

A. All right; we had to go back over a lot of it.

Q. All right. Don't hestitate to let me go back over it because I'm glad to do that, and then Mr. Weber takes about four paragraphs to say how disturbed he is, but lawyers always get disturbed, don't they?

A. (Witness expressed mirth at this point.)

Q. And Exhibit 33, which is again a—no, it's a direct letter. Oh, this was from the Better Business Breau of greater Louisville, addressed to the Zettwoch-Fortner Corporation and it refers to a Mrs. Riggs and they enclose Mrs. Riggs' letter which is dated April 2, 1962, and Mrs. Riggs tells the Better Business Bureau—it is addressed to Zettwoch-Fortner, Louisville Mortgage Company, F.H.A. and the Better Business Bureau, so she has covered the waterfront, hasn't she?

(No response.)

Q. She tells us in April of 1962 that since January of 1962, she says:

(Vol. V, p. 163)

"I have been trying to get results or confirmation from the builder of my home that certain prevailing conditions be improved. Listed below are the complaints I would like to mention:

1. Top on sink warping."

That could be us?

A. Yeah.

Q. But she also adds, Mr. Fortner, that this has been corrected satisfactorily, so it starts out with U.S. Steel, but I must tell you that when—

A. (Interrupting) When we had to correct it. We had to put in another one and get the painter and drywall man back.

Q. Any, that was corrected.

A. That's right. We'all—you'all renewed a lot of them.

Q. Yes sir; I know. Now, she tells us though that she's been asking since January and now it's April:

"Holes in back yard and around septic tank. Soil is sandy and constantly washing away. This condition was corrected once, but needs

(Vol. V, p. 164)

more attention."

That's you?

A. That's right.

Q. "Losing at least twelve feet across the back of my yard due to large ditch which is constantly getting larger each time it rains. This is my biggest problem. In my opinion this condition is very unfair to me as a homeowner. As it is now since I am losing twelve to

fifteen of my yard I can't install a fence in it's rightful boundary. Some dirt was hauled in, but it is still not satisfactory since I'm losing so much of my yard and it is still washing away. My neighbors feel as I do and I am sure any new homes built in this area will have the same problem."

That has to be you?

A. Right.

(Vol. V, p. 165)

Q. "The trees in the front yard have died and the proper people were notified in August, 1961. They were to be replaced in October, 1961, but I haven't seen them yet."

That's you?

A. Yes sir.

Q. "In previous letters—"

And I don't have but this one letter. I presume you had another one at some time, previous letters, or someone in your organization; you don't have any more, do you?

A. No sir.

Q. "In previous letters I have requested that the responsible persons who should be interested to correct these conditions to look at them with me so we can come to a solution. I will appreciate any effort made to resolve my problems."

Turning now to Defendant's Exhibit No. 34, which is a two-page typewritten letter signed by Mr. Craddock, dated August 3, 1962, addressed to Fortner Enterprises—they finally got the real fellow here, didn't they, and relates to Lot No. 62 and states:

"The subject home was guaran-

(Vol. V, p. 166)

teed by the builder and seller, Fortner Enterprises,

Incorporated, against defects in material and workmanship for a period of one year from the date of purchase. The loan on the subject home was closed on or about September 19, 1961. Since that time the following defects have been repeatedly brought to the attention of Fortner Enterprises Incorporated with little or no attention toward correction.

Water stands on front porch and patio floors. Front porch is flush with ground—probably due to error in grading front yard."

That's you?

A. Yeah.

Q. "Bathroom wall under shower-head protrudes outward at center approximately one-half inch."

A. Me.

Q. "After bathroom wall near the

(Vol. V, p. 167)

floor was repaired baseboard and quarteround has not been nailed down."

Your carpenter walked away without putting the nails down, didn't he?

A. I assume.

Q. "Sink top is warped. Should be replaced, but identical color is not available."

That's me.

A. That's you.

Q. "Drainage ditch is caving in and although Mr. Bill Smith, representative of Fortner Enterprises, has promised it will be fixed, no action has been taken."

That's you?

A. (Witness nodded head in the affirmative.)

Q. "Stucco at right rear corner of house has been replaced four or five times—is off again, however."

That's you five times, isn't it?

A. That's me, five times.

(Vol. V, p. 168)

Q. Well, I'll put you down once because there's only one letter.

"Brick veneer on right wall of house is cracked over front window."

That's your bricklayer?

(No response.)

Q. "A gap of approximately one inch between plates and end of rafters or right rear corner of house was puttied rather than corrected with saw, hammer and nails."

A. Could have been you.

Q. Could have been me. Well, why don't you give us an "either" on that; a toss-up?

A. Suit yourself.

Q. Well, Mr. Fortner—

A. (Interrupting) I don't know.

Q. (Continuing)—if I suit myself I wouldn't be here now; how is that? Neither would you, maybe. Well, either, or don't know, huh?

A. Yeah.

Q. "Drywall on ceiling in utility room was broken in installation and a rather messy job of repair

(Vol. V, p. 169)

was done, rather than replacement of drywall."

How would we analyze that one?

A. That's a good one.

Q. Want to toss it up?

A. All right.

Q. Either; all right. "Wrought iron posts at front porch are not secured to roof portion of the porch."

A. That's us.

Q. "When patio was poured concrete was splashed on brick wall and has not been cleaned."

A. That's us.

Q. "By copy of this letter, the Louisville Mortgage Service Company is notified of suspension of payments on loan until corrections are made on the aforementioned defects"; this bird was mad, wasn't he—"and also by copy of this letter a F.H.A. representative is requested—"

Well, he is pretty hot, huh?

A. Sounds like it.

(Vol. V, p. 170)

Q. Sounds like it; all right.

We go now to Exhibit No. 35, which is a form letter or starts out with a form letter of the F.H.A. addressed to Mr. Herman Miles and it makes reference to the Nichols property which he can't identify at this moment by lot number, but it is in the record and over Mr. and Mrs. Nichols' signature, in their handwriting or apparently their handwriting, it has as Item 1, "inferior roof rafter." Who is that, my roof rafter?

A. Un-huh.

Q. Could it have been installed improperly?

A. It is possible.

Q. Well, I'll put "either" down there. Did I install it too?

A. You'all furnished the rafter; they came as a truss-like.

Q. Well, all right; I'll put us down.

"Stone has not been repaired—not finished."

A. Mine.

Q. "Main center sill supported by just wood pillar."

Now, I am not certain what he is talking about;

(Vol. V, p. 171)

A. I wouldn't know. Anything supported by wood like that, that wouldn't be you'all; it would be us if was wrong.

Q. All right. "Driveway approach broken." That's you, isn't it?

A. That's right.

Q. "Garage floor cracked."; that's you?

A. That's right.

Q. "Loose board under kitchen linoleum and linoleum was laid over dirt which is punching holes in linoleum." That's you?

A. That would be us.

Q. "Dry wall repairs." and then we have a footnote that that has been done.

Mr. Anderson: There was also a note to the one above.

Q. Yeah, "Find loose board."

Mr. Anderson: Can't find it.

Q. Yes, what about the dirt under the linoleum; say anything about that, Mr. Anderson?

Mr. Anderson: Hunh-uh.

(Vol. V, p. 172)

Mr. Reutlinger: Maybe it's still there then, you reckon?

Mr. Anderson: Might be.

Q. All right. Now, "Dry wall repairs" and a note that it has been done and you don't know what was wrong with the drywall and neither do I, do you?

A. No, no; all that work was done the right way as far as I know.

Q. So, some of these letters, Mr. Fortner, seem to indicate there was a lapse of months, but we will work into that. You want to give this a tossup, or "either", drywall repairs which has been done; that's fair, isn't it?

A. Well, if it's repaired, why—

Q. It's been done.

A. It's been done.

Q. But he has got his lit—I can't read it—is it all right if I put down "either" for this?

A. I think it should be the other way, but—

Q. All right. Of course now, I can't agree with you all down the line, Mr. Fortner. I'd be in real trouble and we will get some witnesses to talk about that.

(Vol. V, p. 173)

"Cracked and chipped basebords."

That's you, isn't it?

A. I don't know when they were cracked; I assume they—

Q. (Interrupting) Put it this way; it's certainly not our responsibility?

A. Well, we will say it's ours.

Q. It is not ours, is it, the baseboard?

A. Well, we'll say it's ours.

Q. All right; the next note is simply "Hardwood floors" and that's yours?

A. Ours?

Q. "Sweat spots on ceilings; has been fixed, however," it looks like "has been fixed" but when the sweat spots were there, that was you, wasn't it?

A. I don't know what made it sweat. I guess we made 'em sweat; I don't know.

Q. I don't know what you call sweat spots.

A. I don't know either.

Q. Well, we couldn't put any sweat spots on the ceiling. We delivered the package over here in New Albany, didn't we?

A. Yes.

(Vol. V, p. 174)

Q. "Painting, interior and outside, front porch, back door, storm and screen doors and inside walls."

And that's you, you have a painter.

A. That's right.

Q. I think you outnumbered me there on that one. Turning now to Defendant's Exhibit No. 36, which is first, a letter typed over the signature of Mr. Cummings, related to Lot 323, Golden Meadows, dated April 1, 1962, and it is addressed to Zettwoch-Fortner out on the Dixie Highway and is that one of your branch addresses?

A. Yes.

Q. And it says?

"Sirs:"

And in the first paragraph, very short, it says:

"Second letter of notification."

Do you know what happened to the first letter?

A. No sir.

Q. It was not furnished to me.

"Second letter of notification. I wrote you a letter on 26 January, 1962, about certain discrepancies which have developed in this house since I

(Vol. V, p. 175)

have moved in late August."

Excuse me; I'll make a little note that this first letter was not available.

"Since then a few of them have been corrected, some of which very poorly. During the period of heavy rain early in March my basement leaked very badly above and below the ground level. Water came in between the cement foundation and brick about two feet above ground level. Water leaked in where the water pipe comes in through the cement wall and also where steel rods that supported the frame to pour the basement. These are both below the ground level. I called Mr. Earl Smith and Mr. Ed Anshutz—"

Who would he be?

A. Salesman.

Q. Would he work under Mr. Smith?

A. He was just a salesman there that helped out.

Q. All right; he is one of your people.

A. Right.

(Vol. V, p. 176)

Q. All right; "—to come and look at this condition, which they did. While they were here I showed them some of the other conditions that I mentioned in my first letter. In addition I showed them other which I failed to mention, such as the bad condition of the walls throughout the house. Several places where the sheet rock has been jointed to the walls have a pronounced bulge and are cracked, this should not be."

Now, let's take this first paragraph; the leaks in the basement are yours, aren't they?

A. Right.

Q. Now, tell me about the bulge in the walls, where the sheet rock has joined together; could this be your drywall man improperly putting those up?

A. Now, this is the problem we have in the walls all the way through. We just corrected most of them, just working with them.

Q. Mr. Fortner, my question was who created the problem, Mr. Powell?

A. We think U. S. Steel.

(Vol. V, p. 177)

Q. Mr. Powell could not possibly have?

A. I don't know any Mr. Powell. I know we had trouble.

Q. I know we had trouble; there's no doubt of that.

A. What he does wrong or right, I mean I don't know what he did on that particular house.

Q. I don't either, but I mean it is possible Mr. Powell, your drywall man could have made—

A. (Interrupting) I don't think he could make them buckle.

Q. You don't think he could; all right.

A. No, I don't know how he could do that.

Q. Maybe I — I don't know. Then, the second paragraph says that:

"Two weeks ago my wife called the office at Golden Meadows concerning a leaking commode and so far nothing has been done about it. The same thing happened in the other bathroom some time ago but this one was repaired."

I think you have got to give me two on that one, one in one bathroom and one in the other?

(Vol. V, p. 178)

A. (Witness nodded head affirmatively.)

Q. "In this case the plumber told us that when the pipe was installed it had not been soldered."

Which, of course, is your plumber.

A. Right.

Q. And that's the reason you don't get any more black marks for it.

"So, I am taking it for granted that the same trouble exists in the one that is now leaking,"

and he has got a bucket under the pipe and hopes he can move his bucket.

Then he says if you were living out there that you would come out and fix the commode too, and I guess you would; I don't know.

Then again over Mr. Cummings' signature, but on a F.H.A. form dated this time August 24, 1962, which makes reference back to the earlier letter of January of 1962,

which we don't have, and of course the second letter which I just read from says—well, it doesn't really add very much to it. It says that all items have not been corrected and some of the items corrected were done in a rather crude fashion. This house

(Vol. V, p. 179)

is about six months old. The things that have developed in this short period of time indicate very poor workmanship in the construction of the house. Many personal phone calls to Mr. Smith about conditions in the house resulted in very few corrections. Enclosed you will find copy of letter I sent to builder."

My only conclusion is that he is referring to his letter of April 1, 1962. Do you have any knowledge, in your files now, Mr. Fortner, with you, do you recall when I subpoenaed you and asked you to bring with you all of your records regarding this transaction?

A. Yes sir.

Q. And I assume, Ken, that you have got everything you had.

Mr. Anderson: Now you're referring to his January 26th?

Mr. Reutlinger: Well, I know we don't have that, but he says he encloses a letter.

Mr. Anderson: That's the April 1, 1962 letter.

Mr. Reutlinger: It doesn't say so—yes he does, all right.

Mr. Anderson: The construction complaint is dated April 1, 1962, and his letter to

(Vol. V, p. 180)

Zettwoch-Fortner is dated April 1, 1962.

Mr. Reutlinger: Okay; you are right.

Mr. Reutlinger: Turn now to Defendant's Exhibit No. 37 which is signed by Mrs. Hornback, and it is dated September 27, 1962 and, curiously enough, Mr. Fortner, this

is a letter thanking you, but I have got to get it in the record because she is thanking you for fixing a leak in the basement and the leak in the basement would be yours when it existed, wouldn't it?

A. Yes sir.

Q. She says:

"The work was satisfactory and therefore releases Fortner Enterprises from any responsibility of damage that should occur from this leakage in the basement",

and the leak in the basement would be yours when it existed, wouldn't it?

A. Yes sir.

Q. She says the work was satisfactory and she is happy with the fixing of the leak.

Turning now to Exhibit No. 38 which are sev-

(Vol. V, p. 181)

eral letters also relating to—I can't give you the lot number but it's the Gordon property and starts out with a letter on August 6th which is handwritten and it is addressed to Mr. A. B. Fortner and that's you right off, just nobody—I mean addressed to you. Did you get this letter, presuming that—

A. (Interrupting) I'm sure I did.

Q. "Enclosed is a copy of the repairs needed—" and giving the address of 5106 Constance Drive, Valley Station, in Golden Meadows.

"Many of these repairs were reported before, but as of yet no response. As our year will be up on August 21st, I want some guarantee that my house will be fixed to be up to par. I have also sent a copy to F.H.A. in a registered letter. No matter how long it takes I want my house livable. If you have any questions please feel free to call on us.", and they

give the telephone number and then there is a list which has been stamped as "received" by the F.H.A. on it,

(Vol. V, p. 182)

April 8, 1962, which begins with "Cracked fixture in bathtub", and that's you.

Mr. Anderson: Excuse me, Mr. Reutlinger; that was August date.

Mr. Reutlinger: April 8th.

Q. I'm sorry; it is August 8th, you're absolutely right. "Cracked floor tile in bathroom."

A. Yes sir.

Q. "Repair strip in bathroom molding, also the middle piece going to the hallway."

A. Yes sir.

Q. I'll just give you one although there are two small pieces. Then, "Repair leak in faucets".

A. Us.

Q. "Repair molding south of kitchen door closet."

A. South of kitchen door closet?

Q. It just says "Repair molding south of kitchen door closet."

A. I don't know whose that would be.

Q. I'll tell you what I'll do; let's scratch

(Vol. V, p. 182)

that one off.

A. All right.

Q. Because I don't know which way south is, so I don't know where that house faces.

"Repair around new sink tops, either drywall or paint."

A. Uh—

Q. (Interrupting) She doesn't want a new sink top; she wants repair around the sink.

A. That's where when they put the wall together they didn't square up and it always left a crack, either at one end of the cabinet or the other which you put some dope in.

Q. All she wants is something—either drywall or paint, but okay, you say it's us.

A. Fill that crack up, yeah.

Q. All right; your men couldn't fill that crack up when they built the house?

A. We filled up a lot of 'em, yes, but it was your fault that made us have to fill 'em up.

Q. I see. All right.

"Repair the crack in the hallway floor leading to the kitchen door."

(Vol. V, p. 183)

A. That's us.

Q. "Repair or finish stairway landing."

A. Stairway?

Q. That's what she says, "Repair or refinish stairway landing."

I assume she means the attic stairway or there might be a basement—is this a basement house; I don't know.

A. That's right; could be; that would be us.

Q. "Check leak around kitchen door. Take up molding if necessary."

A. I have no idea whose that is.

Q. Okay; I'll put a "B.K." for that. Then: "Refit living room front door."

A. That's yours.

Q. Well now, do these doors come installed?

A. Come installed; supposed to be perfect, lock and key.

Q. Are they hung by your people?

A. No, we had to take a lot of them down and rehang them.

Q. That's right. "Fix tile around kitchen vent."

A. That would be us.

Q. "Readjust the southwest bedroom

(Vol. V, p. 184)

closet door."

Don't answer; I know you're going to say us.

Q. "Fix floors, fill cracks and reinforce."

A. That us.

Q. That's you, and this is underscored—also underscored is this language "Basement still leaks under kitchen door." And that's you.

A. Yes.

Q. "Replace or repair lower section northwest bedroom window."

(Witness pointed to Mr. Reutlinger at this point.)

Q. "Repair flaw in back porch, front end."

A. That's us.

Q. "Fill cracks in stone throughout whole house."

A. That's us.

Q. "Replace two front trees."

A. That's us.

Q. "Repair flaw in gutter around porch of house."

A. That's us.

Q. "Check outlet drain in basement

(Vol. V, p. 185)

wall."

A. Outlet—that would be us.

Q. This is a basement house, obviously now, isn't it?

(No response)

Q. "Return pop-off valve and pipe." And that's your furnace?

A. That's us.

Q. "Calk all wood and stone joints of roof, windows and joints."

A. That's us.

Q. "Relocate property corner stakes." We didn't put the corner stakes down?

A. No, that's us.

Q. "Kitchen cabinets have scratches on them, reported before we moved in."

Now, we furnished the kitchen cabinets, didn't we?

A. Yes sir.

Q. Could they have been scratched by some of your people during the construction?

A. They could have been.

Q. All right; let's put "either" down.

(Vol. V, p. 186)

"Bleached-out wood in living room and bedroom, reported before."

Do you know what they mean there?

A. No, I don't. I don't know whether they're talking about the woodwork or the floors.

Q. I don't either. Let's put a D.K. for that one then. "Replace stained door knobs."

A. Stained?

Q. That's what is says, replace stained door knobs.

A. I assume that's us if it is stained.

Q. Yes. Now, they follow this up with a letter under date of August 21st to the F.H.A. which says:

"Repairs need to be made on hardwood floors. Bedroom window needs replacing. Wood and stone joints in roof and windows need to recalked. In short, check list I sent you—"

And so there is no point in going through again because this is a duplication and then they have attached

(Vol. V, p. 187)

to that a second sheet which has some items crossed off of it

and I will read to the jury the items that are crossed off which are, and, Ken, I am uncertain whether they intend to cross it off or not, but it says—there's a line drawn through—a very fine line drawn through "repair molding south of kitchen closet door" and there is definitely a line drawn through "repair new sink tops, either drywall or paint" and there is a fine line drawn through "finish stairway landing" and there is definitely a line drawn through "refit living room front door" and there is definitely a line drawn through "readjust southwest bedroom closet door" and there is definitely or a partial line drawn through "fix floors, fill cracks and reinforce" and there is definitely a line drawn through "basement still leaks under kitchen door," and there is definitely a line drawn through "replace windows" and there is definitely a line drawn through the "outlet drain in basement wall" and then we go to the final exhibit on this point, which is Exhibit No. 39 and it is addressed to the F.H.A. and it is dated May 27, 1963.

It makes reference only to an F.H.A. number, 20-086411 which I have not been able to key into with any of these other F.H.A. numbers or complaints. It

(Vol. V, p. 188)

is not signed, but of course it is only a copy and it purports to have been signed by the Treasurer of Fortner Enterprises which again, would be Mr. Miles, wouldn't it?

A. Yes sir.

Q. It has three items and he is apparently replying to F.H.A. inquiry:

"Item 1, stucco on foundation. I am not sure if anything has been done on this, however we'll have the concrete man recheck it."

That would be your responsibilty, wouldn't it?

A. Yes sir.

Q. And Item 2:

"Kitchen tile and subfloor, kitchen. There is no subfloor in this house, only plywood underlayment. Kitchen tile was completely replaced on June 19th."

The kitchen tile would be your responsibility?

A. Yes sir.

Q. And the final item was:

"Wood loose in eaves. The plywood in the eaves was renailed at the same

(Vol. V, p. 189)

time that the kitchen floor was replaced."

Of course you say those eaves are ours, don't you?

A. Yes sir.

By the Court: Is that all of those exhibits?

Mr. Rentlinger: Yes, Your Honor.

By the Court: Now, it is now after three o'clock, ladies and gentlemen of the jury; we will adjourn for the day and you will remember the admonitions of the Court.

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TRANSCRIPT OF PROCEEDINGS

VOLUME VI

Before Honorable James F. Gordon, United States District Judge, For the Western District of Kentucky, at Louisville, Kentucky, on Monday, June 8, 1970.

(Vol. VI, p. 3)

By the Court: All right, gentlemen; who will you have?

Mr. Reutlinger: If we may, we continue with Mr. Fortner, please.

By the Court: All right; you waive the roll call of the jury, gentlemen?

(Whereupon, counsel for the parties indicate in the affirmative.)

By the Court: All right; come around, please, sir.

(Whereupon, the witness A. B. Fortner, Jr., resumed the witness stand and the following proceedings occurred.)

Cross-examination Continued by Mr. Albert F. Reutlinger

(Vol. VI, p. 4)

Mr. Reutlinger: Mr. Fortner, when we were talking about basement materials the other day I overlooked or forgot to get in another exhibit and I show you a photostatic copy from the Cook Lumber Company on Lot 196 and ask if it doesn't show a bill for material for a B-1 basement in the amount of $583.99?

Mr. Fortner: Yes, sir.

Mr. Reutlinger: We would ask this be offered as Defendants' Exhibit No. 119.

By the Court: Let it be filed.

(Whereupon, an invoice of the Cook Lumber Company dated 1-30-62 in the amount of $583.99 was marked for identification as Defendants' Exhibit No. 119 and received in Evidence.)

Testimony of Mr. A. B. Fortner, Jr.

Q. And although this may be duplication, Mr. Fortner, because each side has its own system of indexing, I would like to submit for the defendants, Exhibits No. 120, 121 and 122, photostatic copies of the closing statements on Lots 79, 710 and 217, in that order and ask they be filed in evidence as

(Vol. VI, p. 5)

Defendants' Exhibits.

By the Court: Let them be filed.

(Whereupon, a document entitled "disbursements for seller," dated 10-6-61, was marked for identification as Defendants' Exhibit No. 120 and received in evidence; a document entitled "Debits and Disbursements for Seller" on Lot 710, Golden Meadows, section 4A, was marked for identification as Defendants' Exhibit No. 121 and received in evidence; a document entitled "Disbursements for Seller" dated 7-9-62, was marked for identification as Defendants' Exhibit No. 122 and received in evidence.)

Q. When we finished up on Friday, Mr. Fortner, we were discussing defects or mistakes or something like that with regard to the various homes.

Now, let me ask you this; you did make, I believe, a second contract or transaction with the

(Vol. VI, p. 6)

Steel Company people which we have identified and tendered as our Exhibit No. 8; that would be this second loan agreement which is dated August 2, 1961?

A. Yes, sir.

Q. If it has not already been filed I ask that this be filed although I suspect it was done earlier. Now, this original has your signature on it and your initials throughout, I believe?

A. Yes, sir.

Q. That transaction which I will call the second transaction involved thirty-two different or other building lots, didn't it?

A. Yes, sir.

Q. The earlier transaction, the one we discussed at some length which was made in 1960 involved one hundred eighty-seven lots?

A. Yes, sir.

Q. And of course the one hundred eighty-seven and then this additional thirty-two are the two hundred nineteen overall lots which we have discussed, touched on and discussed from time to time?

A. That's right.

Q. The date of the second transaction, I believe, in August of 1961, and I think August 2nd;

(Vol. VI, p. 7)

is that right?

A. Yes, sir.

Q. Do you know how many homes you had completed by that time?

A. No, sir.

Q. Well, that is kind of a rough question. I don't mean to do that to you, Mr. Fortner. I show you a paper called "Sequence of events" following the sale of homes in Golden Meadows Subdivision and this was furnished me by Mr. Anderson; have you seen it before today?

A. Yes sir.

Q. Now, before we get into that look at the third page, the fourth line down, on Lot 50.

You will notice where it says on the very last column on the right-hand side, construction completed 60-8, or June 8th of 1962.

I am suggesting to counsel that that 1962 perhaps is in error and that should be 1961 since you have told us that

Lot 50 was sold and delivered in June of 1961, your Exhibit No. 47.

Mr. Anderson: That—did I tender that?

Mr. Reutlinger: What, this?

(Vol. VI, p. 8)

Mr. Anderson: Yes.

Mr. Reutlinger: No, I did.

Mr. Anderson: Well, you said my Exhibit 47.

Mr. Reutlinger: Your Exhibit 47 is the closing statement on Lot 50.

Mr. Anderson: Oh, I'm sorry.

Mr. Reutlinger: No, no, no, you had not tendered that.

Mr. Anderson: I had not tendered that because I wanted to revise it.

Mr. Reutlinger: I know you hadn't offered it.

Mr. Anderson: That is something that we prepared—that was prepared by me, Your Honor, from certain answers to interrogatories and certain documents and I have previously informed Mr. Reutlinger that I planned to revise that although I would tender it.

Mr. Reutlinger: I have never seen any revision, if Your Honor please. Of course I'd like to see the revision before I get into trial, but it serves my purpose to use this document.

Mr. Anderson: All right; I

(Vol. VI, p. 9)

made a mistake on that.

Mr. Reutlinger: It's purely—I'm trying to get it in order so I can work with it is what I am trying to do.

Q. Well, your counsel has indicated that possibly if the house was sold in June of 1961 that that statement that that construction is not—wasn't completed until June of 1962 might be in error. I think you'd agree with that.

A. I just don't recall.

Q. I understand that you don't know. Well, all right; you sold that lot in, uh,—let's do it the hard way then. Here is the contract for Lot 50 which is your Exhibit 47—Lot 50?

A. Yes, sir.

Q. Exhibit 47?

A. Yes, sir.

Q. Dated March 6, 1961?

A. Yes, sir.

Q. Now, did you close this house in June of 1961 or did you close it a year and some-odd months later in June of 1962?

A. I couldn't tell you.

Q. All right. Let's assume that you closed

(Vol. VI, p. 10)

it in June of 1961 for the purpose of our discussion and when we get Mr. Cooper perhaps he can help us with that.

This is not going to be a question you can answer without taking that and analyzing it, but of course it was furnished me by your lawyer. I'm going to ask you, however, to assume based on the piece of paper you hold in your hand that on August 2, 1961, which is the date of the second contract, you had completed thirteen home packages.

With that fact known to you can you tell us some of the reasons why—eventually I'm going to ask you all of the reasons—why you wanted to again borrow money from the Credit Corporation by the second contract and again pledge property and again restrict the property to U. S. Steel homes packages; why did you get into the second deal?

A. There was several reasons.

Q. All right.

A. Mr. Miles had agreed to take these lots and he was buying lots from us all the time and he agreed to take these thirty-two and when I hired him to manage the Golden

Meadows for me, the U. S. Steel deal, why, he didn't want to hold those lots or

(Vol. VI, p. 11)

he didn't want to build on 'em while he was in competition with me and I agreed to take 'em back and, uh, we were having people to ask for different homes over in the different locations.

They had seen vacant lots on the other side of Dearing Road and that was one reason and the other reason, by that time we were taking so long to get these other houses finished and where we were running out on the packages and we were running short of cash and, but day by day we were told it would kind of straighten out and we just kind of went along on this basis and we naturally felt they'd be able to straighten it out and we did take that package.

Q. Well, let me ask you this; was there any legal reason and what I'm seeking here is your understanding, was there anything in the first transaction or contracts, those are the ones back in October of 1961, which compelled you or obligated you to again borrow money from the Credit Corporation and again pledge those thirty-two other additional lots in exchange for that loan?

A. Only thing, I had to come up with these payments on this interest.

Q. I—now, Mr. Fortner, I didn't ask you

(Vol. VI, p. 12)

if there was any financial reason. I said was there any legal reason why you had to take these thirty-two lots and make a new deal with them?

A. Not to my knowledge.

Q. All right. Now, you knew when you went back to the Credit Corporation with these thirty-two lots that if you borrowed money to buy those lots from the Credit Corporation they were going to tell you that you had to buy

the home packages with the money that you borrowed—put it on those lots, didn't you?

A. Yes, sir.

Q. You didn't think you could get the money from the Steel people to buy someone else's product, did you?

A. We had no intentions at—

Q. (Interrupting) Mr. Fortner, not your intentions; my question is you knew that you couldn't do it?

A. Yes, sir.

Q. All right; but you were under no legal compulsion to borrow money at all from the Credit Corporation at the time of the second transaction, were you?

A. No, sir.

(Vol. VI, p. 13)

Q. Let me—one thing; this had the same financing terms in it, and when I'm speaking of "this" I'm speaking of Exhibit No. 8 which indicated, and I may be repetitious here, my notes are hazy, that you were going into the eighty-five percent F.H.A. financing?

A. I beg your pardon?

Q. The eighty-five percent F.H.A. financing had the same language in it about the eighty-five percent as the others?

A. I'm sure it did.

Q. Right there, Part (C), Section 1 on Page 5?

A. Yes, sir.

Mr. Reutlinger: I would also at this time like to offer as Defendants' Exhibit 123 the "Sequence of events" folder from which we have taken testimony.

(Whereupon, a document entitled "Sequence of Events Following Sales of Homes in Golden Meadows Subdivision" was marked for identification as Defendants' Exhibit No. 123.)

(Vol. VI, p. 14)

Q. Did you visit the plant at New Albany any time between the date of the first contract which was October of 1960, and the second contract which was August of 1961?

A. Did we visit—did I visit the office?

Q. Well, I really did have in mind the plant; go through the factory?

A. I nver did get back in the plant.

Q. Did you get back in the plant before the first contract?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Anybody on your organization ever go, to your knowledge?

A. I, uh, couldn't tell you.

Q. You don't—well, the answer—

A. (Interrupting) The day I was over there they said you had to have goggles to go through and they was out of them, so—

Q. (Interrupting) Now, for whatever reasons or whatever purposes you did make a contract with the company again, a brand new one. It was a whole new ball game as far as these thirty-two lots

(Vol. VI, p. 15)

were concerned, wasn't it?

A. Yes, sir.

Q. On August 2, 1961. Tell us, from that date to the end of 1961, stopping just before New Year's Day, your understanding of the general market conditions and your selling out there in Golden Meadows?

Mr. Anderson: Excuse me, Your Honor; that seems to me to be a two-part question, if I understand; general market conditions to mean overall and then—

Mr. Reutlinger: (Interrupting) I thought I said in

Golden Meadows, but I'll rephrase the question; withdraw it.

By the Court: Divide it into two pieces.

Q. Tell us your understanding or your belief concerning the—strike the—I'll strike the word general—concerning the sales activity at Golden Meadows from the day of the second contract, which was in August of 1962, to the end of that year?

A. Sales were very poor.

Q. And you have already told us you attribute that to the merchandise we were furnishing you?

(Vol. VI, p. 16)

A. More or less, yes.

Q. More or less. Were there any other factors that were contributing to the poor sales?

A. When I said poor sales, it's just because we didn't get delivery or we didn't get the shortages or we couldn't repair what they had sent over.

Q. Were there any other factors other than that contributing to those?

A. No, I can't think of any.

Q. Would weather be a factor?

A. I don't recall the weather.

Q. Well now, it's my understanding and I certainly don't propose to be a builder and expert in the field, but I think it is common knowledge that weather is a factor in the building trade and that during the winter months building slows down some; has this been your observation?

A. I thought you was talking about sales.

Q. Well, don't you have to have some completed homes to close them or are you and I talking—sales are different things?

A. No, sir; whenever those homes are sold.

Q. By contract?

(Vol. VI, p. 17)

A. By contract.

Q. I see; you're talking about in the making of a contract, you make a sales completion and completion is something else again depending on many factors?

A. Yes, sir.

Q. Well now, if sales are poor because of our inability to furnish merchandise and making repairs promptly, as you say, and then if you tell me in your testimony that a sale is a contract, the purchaser simply signs the contract, I assume based on a model or some other thing, that has nothing to do with the actual building of the house, does it?

A. Most of them was sold by, uh, contract.

Q. Now, Mr. Fortner, that wasn't—I don't think it was responsive to my question. You see, when I asked you that first question about sales, in my mind, and, uh, this is where you are educating me, I had in mind a completed transaction, a closing, and you have told me that I was mistaken.

When you used the word "sales" you meant sales from a contract; that's what you said, isn't it?

A. We would draw up a contract.

Q. And you called that a sale?

(Vol. VI, p. 18)

A. Then we would—call that a sale, yes.

Q. All right. Now, let's stop right there. You draw a contract and a man signs it and you call that a sale. Then you tell me sales were slowed down in this period we are discussing, August, 1961, to the end of the year because of the defective merchandise and because we weren't making repairs promptly, yet you say a sale is just the signing of a contract. That has nothing to do with the order; that's done later; is that right?

A. Right.

Q. Now, can you tell us again—maybe I misunderstood you, why sales were poor.

A. Well, we—we were having trouble with our sales from the—we couldn't produce from before this date. We had sold a lot of houses right after our opening, in the next two or three months, but we couldn't produce. We couldn't get 'em on the market and this is where we got all of the complaints; this is what hurt our sales; this is what run the salesmen off the job.

Q. Mr. Fortner, you didn't have anything on the market. You weren't selling a completed house, as I understand it; you were selling from a model?

(Vol. VI, p. 19)

A. Right.

Q. A contract?

A. That's right, but they quit buying because the blackeye was getting the subdivision, the trouble we were having.

Q. Only from U. S. Steel?

A. I said we were having a little trouble of our own.

Q. All right; that's what you meant when you said "more or less"?

A. No, sir.

Q. Now then, getting back to delay in performance of the contract, you tell me weather has no part in this?

A. I didn't say that, I don't think.

Q. All right then; weather does play a part in it?

A. I didn't say that.

Q. Does weather play a part?

A. Yes, if it's bad weather it slows down construction.

Q. Now, you don't get your money on a sale until it is closed, do you?

A. That's right.

(Vol. VI, p. 20)

Q. Do you have any trouble or did you have any trouble with some of your people that you sold houses to obtaining credit?

A. I don't remember; I assume we had the normal amount.

Q. Well,—

A. (Interrupting) You sell seven or eight houses and you would run into one or two bad ones or good ones or—

Q. (Interrupting) That's right; that doesn't shock me to hear you say that. So that in some instances the delay in the closing, and all of the time your interest is running and because of a bad credit risk of a purchaser—

A. (Interrupting) I don't think that delayed the closing because we had all that length of time. We was only supposed to have forty, fifty days, and sometimes it was three or four months before closing and I would imagine that the credit was checked right on the start and approved a long time before.

Q. You had no credit extensions in any of these transactions?

A. Credit extensions?

(Vol. VI, p. 21)

Q. A fellow would come in and he'd want some more time, request F.H.A. for a credit extension?

A. No, not to my knowledge.

Q. Not to your knowledge; all right. Well, you basically though have told me, and I guess I am right that it was not a pretty picture as far as you are concerned or as far as you were concerned during the period from this contract, the second one in August to the end of the year?

A. That's right.

Q. You didn't want—

A. (Interrupting) We just lived in the hopes that their promises would become true; that it would be straightened out. We just couldn't imagine it being that bad.

Q. All right. Now, I want you to look at the tendered Defendants' Exhibit No. 6, Mr. Fortner, which is a letter

you wrote to Mr. Neal Day and I will first ask you if this isn't the original of that letter?

A. Yes, sir.

Q. It bears your signature, doesn't it?

A. Yes, sir.

Q. And you, in fact, did write it on January 5, 1962, didn't you?

(Vol. VI, p. 22)

A. Yes, sir.

Mr. Reutlinger: I will ask that that be filed as Defendants' Exhibit No. 6.

(Whereupon, Defendants' Exhibit No. 6 was received in evidence.)

Q. I'm going to read parts of this letter and I certainly have no objection to all of it being read or maybe it would be better to do it all anyway.

Anyhow, you wrote Mr. Day on that date saying this:

"Earl--"

Now, this is Earl Smith, isn't it, that you are referring to?

A. I assume here, this starts off "Earl" and I imagine that's Earl Smith, yes.

Q. Yes, Earl Smith; now, he is your salesman?

A. This says "Earl".

Q. I know it says "Earl", but I'm trying to identify him?

A. I think that is who it is.

Q. Well, who did you have in mind when you wrote the letter?

(Vol. VI, p. 23)

A. That's what I'm saying; I think this is who it is.

Q. You think; you don't know?

A. Yes.

Q. All right; I am trying to find out what you know and not what you are guessing at, Mr. Fortner.

A. I know it.

Q. (Reading.)

"Earl told me in your meeting with him and Miles last Tuesday—"

That is Herman Miles, isn't it?

A. Yes, sir.

Q. (Continuing)

"—that you turned us down on our request for assistance in showing a model home at the Fairgrounds in the forthcoming Home Show. You also mentioned that your company has gone into shopping centers with models, and the experience was sad. Neal—"

Now, this is Neal Day of the United States Steel you are writing to?

A. Yes.

Q. (Continuing) "—I can well understand

(Vol. VI, p. 24)

that; remember that people flock to shopping center openings and all the promotion is for the center itself and the people are interested in seeing the shopping center and winning some of the fabulous prizes given away for visiting the various stores. Second, shopping centers are usually built in, or around new subdivisions, where the majority of the people have already bought new homes. I want to list below some of the reasons that I wish you and Stan—"

And this is Stanley Mack, I assume?

A. Yes, sir.

Q. (Continuing)

"—would—"

And he is the one that testified, uh, well, he testified on Friday?

A. Yes, sir.

Q. Or whenever it was;

"—would take into consideration and review our case.

"1. We are in a po ition where

(Vol. VI, p. 25)

it is imperative that we sell one hundred fifty homes during 1962, which will amount to $1,800,000.00.

"2. Our advertising budget based on the volume above will be $36,000.00.

"3. Where else can we expose our homes to as many people, and better contacts than the Louisville home Show. We need a 'gimmick' and believe this is it.

"4. Our biggest and nearest competitor, Ben Swindler, has sold well over a hundred homes this past year, and I think that everyone that will compare his home at $11,875.00 with our B-1 at $11,400.00 will agree that we have the superior house for less money."

Now, let's stop and talk about this Paragraph No. 4 or as much of it as we have read so far and there is more of it; where was Mr. Swindler building about the time you wrote this letter, generally; I'm not trying to pinpoint it?

A. I think this particular deal we were

(Vol. VI, p. 26)

talking about was over on Third Street in the Moundview Park.

Q. It was in the same general area of the county?

A. Yes, that's right.

Q. And like every good businessman, you had people over there showing them to see what he was offering and what price he was offering?

A. That's right.

Q. Because business is competitive, isn't it?

A. That's right.

Q. Now, you tell Mr. Day that the B-1 model which was

the U. S. Steel homes package, was a better house than Swindler was offering?

A. Yes, sir.

Q. And you also tell Mr. Day because you had shopped the Swindler subdivision and knew what the price was that you were offering better merchandise than Swindler for $475.00 less; is that right?

A. That's right.

Q. Was Mr. Swindler trying to tell you something there, Mr. Fortner; was he telling you that you might be underpriced; that you may have made some

(Vol. VI, p. 27)

wrong estimates somewhere?

A. I don't know what Mr. Swindler was trying to tell me.

Q. Well, all right. In any event, you told Mr. Day that in your opinion our house was better, was being sold for less and you wanted to move ahead, didn't you?

A. That's right; we were doing anything we could to move ahead. We thought this Home Show might be the trick; we tried everything else.

Q. All right; and then:

"Mr. Swindler had a home in the Home Show in 1961 and is going back in 1962. According to my information from the National Association of Home Builders, eighteen homes were sold the week of the Home Show last year and that Mr. Swindler was forced to send his salesman from the Home Show to his subdivision as people were going from the Home Show to the subdivision.

"5. It is our contention that the people visiting the Home Show are

(Vol. VI, p. 28)

people that are definitely interested in homes and the

class of people that buy, either directly or indirectly, are in the $11,000.00 to $13,000.00 bracket.

"6. We have in our organization, twenty-five salesmen and by dividing their time between the Home Show and the subdivision we can handle far more prospects than any of our competitors and if each salesman can sell one house in addition to leads for future sales we would have the momentum to carry us through '62 and meet our quota.

"7. We have discussed this with a number of our subcontractors and they are very much interested and will cooperate fully.

"We will also have a number of our station wagons at the Fairgrounds and operate a courtesy-car service from Fairgrounds to subdivision and return for those who would like to see our full line of homes and the

(Vol. VI, p. 29)

location.

"We will furnish, decorate, sod and shrub our home in a manner that will best sell the price home we are offering and feel sure that no one can match the home for the same amount of money.

"We will furnish all literature, floor plans and all the selling aids necessary, including signs, favors, and so forth.

"Now, we are getting down to the cost. Construction, dismantling and moving house to subdivision; various losses, such as ceiling and floors which no doubt would be completely lost to us. As far as labor, we could keep that to a minimum by using our foremen and possibly a couple of your product service men. Our heating plant and plumbing can be installed and taken out at no cost.

"We would purchase the package, pay for it on our present plan, or a

(Vol. VI, p. 30)

special plan as you would decide, handle everything mentioned above, plus keeping a cleaning person on the job. Your participation would be $4,000.00.

"We feel that if you and Stan were acquainted with the Louisville Home Show as Miles, Earl and myself are, you would not hesitate to go into this project with the most enthusiasm and confidence."

Now, the date you wrote that letter, which was the 5th of January of 1962, do you know how many homes you completed?

A. No, sir.

Q. I suggest that the exhibit sequence of events which I furnished you, when analyzed, will show that on that date you had completed forty-three homes and if that exhibit bears that out, and I am confident that it will, then you already had ordered, constructed and completed forty-three of our homes when you wrote that letter, which is Defendants' Exhibit No. 6, didn't you?

A. Yes, sir.

(Vol. VI, p. 31)

Q. Now, after the date of that letter tell us what the market was out there generally at Golden Meadows say to around the first part of June of 1962; we are now in '62, aren't we?

A. Yes. Well, far as Golden Meadows was concerned it was very slow. We just never could pick up momentum once we lost it. Everything we tried, why, it didn't work.

Q. Did you have any problems with the weather that spring in constructing?

A. I don't recall.

Q. Do you know if there was a general slump in the

real estate market that started maybe late in 1961 and proceeded on into '62?

A. Not to my knowledge.

Q. Not to your knowledge?

A. To my knowledge.

Q. Hadn't noticed it?

A. No, sir.

Q. Now, during this time, the late 1961 and early 1962, in some of your other corporations, particularly Zottwoch-Fortner, were you conducting a general real estate business?

A. Yes, sir.

(Vol. VI, p. 32)

Q. In other words, if I had a house and I wanted to list it for sale you could do it for me?

A. Yes, sir.

Q. Separate and apart from Golden Meadows?

A. Yes, sir.

Q. Did you sometimes list those through the Multiple Listings service of the Real Estate Board?

A. Yes, sir.

Q. Did you notice any dip in your Multiple Listing sales?

A. I would imagine there would have been without checking because we had most of our men out at Golden Meadows most of the time.

Q. I see. Well, my question was did you notice a dip in the Multiple Listings sales?

A. Generally?

Q. Generally.

A. I don't think there was.

Q. You don't know?

A. No.

Q. How many model homes did you have at the project, Golden Meadows?

A. We started out with five and then I think we built one or two extra; I don't remember.

(Vol. VI, p. 33)

Q. Did you use one as an office?

A. Yes.

Q. So, you really had, if we use the number 5, you had one as an office which, I assume you had hoped when the project was completed to convert to a home and sell it and move on?

A. Well, we used one of the decorated models as the office just very shortly.

Q. I see.

A. But then we built another one and put a lot of windows and different displays around and used that one for our house—uh, office.

Q. Well, and that's what you ultimately hoped to do with the office?

A. Yes.

Q. I mean, you would dispose of it at the tail end?

A. That's right.

Q. Now, you had an office and four other model homes?

A. They were all five models, all decorated.

Q. All right; you had five models, one of which you were also using as an office part time?

(Vol. VI, p. 34)

A. Temporary, part time.

Q. Did you have any more of those so-called models?

A. I think we had, uh, two more, one or two; they wasn't furnished.

Q. Yes.

A. I believe that's it.

Q. Can you tell us, certainly for the benefit of the jury, the difference between a contract sale and speculative building?

A. Well, we sold on contract and then, uh, we built later and, uh, speculative building, you build a house and try to sell it.

Q. Well, you are being a little bit briefer than I wanted; let me put it to you this way and see if my understanding is not correct; in contract sales except for the land, possibly and certainly in this instance you had nothing invested other than the cost of the land, plus maybe your pro rata portion of the investment in the models, so forth, you had no money invested on this particular house except for land, did you?

A. No, just overall, as you say.

Q. Yes, but you certainly hadn't put out

(Vol. VI, p. 35)

that first penny for a home package or brickwork or anything like that?

A. No.

Q. That's what we call a contract sale, isn't it?

A. That's right.

Q. And if I would walk out to Golden Meadows and I liked your model and you said, "Well. we will put it on this lot", which was vacant and I sign a contract, this would obligate me to buy the house that would later build, wouldn't you?

A. Right.

Q. Now, after I had signed the contract when I am obligated then you are obligated too; it's a two-way street?

A. That's right.

Q. Then, you would order the home package and it would come and you would put it in place and you would get your bricklayer and your plumber and your carpenter and your painter and they would put the house together and those people would have to be paid all the time you were doing that; that right?

A. Some of them.

Q. Well, maybe some of them would hold

(Vol. VI, p. 36)

back, but sooner or later they had to be paid anyway?

A. Right.

Q. All right; and at the closing I would put my money on the line, complete my contract and you would deed me the property and there you would be; that's the close of it?

A. (Witness nodded head affirmatively).

Q. Now, if I understand speculative building, you would take your investment in the land and you would buy a home package; you would build the house complete without having anybody committed to buy it and then hope to sell it, wouldn't you?

A. Yes, sir.

Q. How many speculative houses did you have in this subdivision say the end of May, 1962; May 31st?

A. I don't recall.

Q. We have, as you know, sent Ernst & Ernst over to look at your books?

A. (Witness nodded head affirmatively).

Q. And I am sure you have seen a copy of their report because it has been furnished your lawyer?

A. (Witness nodded head affirmatively).

Q. Ernst & Ernst tell us that you had

(Vol. VI, p. 37)

eleven speculative houses including your models and office in the subdivision at that time?

A. Well, that would be five of our original models and one or two—

Q. (Interrupting) Five and six are eleven.

A. One or two.

Q. Yes, sir.

A. Might have been two.

Q. Yes, sir.

A. And we had some that had fallen through that we

was already started on and for some unknown reason we had to use those also. I think that's what he was counting as speculative; houses we had to resell.

Q. You had no speculative buildings as such?

A. I can't recall but one or two, just strictly speculative.

Q. Well, could you have at least one or two strictly speculative?

A. Could have; I don't know.

Q. You don't know; all right. Well, let's say you only had one strictly speculative and that means that somewhere along the line—well, put it this way; if I build one speculative house I have put

(Vol. VI, p. 38)

my money in that house believing that I am going to sell it, hoping that I am going to sell it anyhow; that right?

A. Yes, sir.

Q. Why would you put money in the house in Golden Meadows, even one speculative house if the subdivision was going sour?

A. I don't know as we had one what you would call strictly speculative house. They—it may be it became speculative because the models are—some had been turned down someway.

Q. I understand, but let's assume you had at least one speculative house there?

A. Yes, sir.

Q. If you did, why would you put the money in it hoping to sell it in the belief it was not going to sell?

A. Well, I wouldn't have done it if I didn't think I could sell it sooner or later.

Q. All right; you heard Mr. Mack testify about the $10,000.00 package last Friday. When did you first get the idea that you would want to sell a house for $10,000.00, house, lot, the whole works, the whole thing?

(Vol. VI, p. 39)

A. We were talking about anything that we could think of to make this subdivision go and so we could pay U. S. Steel back their money.

Q. Yes, Mr. Fortner; my question was when?

A. When did we start talking about it?

Q. Yes, sir.

A. I don't recall.

Q. Well, I know you don't recall—don't know to the day, but about when?

A. I don't recall.

Q. Well, was it sometime in the early part of 1962?

A. I just don't recall when we first started talking about it.

Q. Who did you talk with about it?

A. We talked to Mr. Miles and, uh, talked to Mr. Robinson a little bit and maybe Earl Smith. I don't recall exactly who all we talked to about it.

Q. All right; did you talk to any of the people over at U. S. Steel about it?

A. Yes.

Q. And who did you talk to over at U. S. Steel about it?

A. I believe we talked mostly to Mr.

(Vol. VI, p. 40)

Grayson.

Q. He was the salesman or that was his project with you for the Steel people, wasn't it?

A. I think it ended up that way, yes.

Q. All right; did you talk to Mr. Mack about it?

A. Well, if that letter said I did, I did. I don't recall right now what we said to him; I'm sure we did.

Q. Your basic home package, the B-1, was right around $3,000.00 and I'm dealing now in round numbers, but that's about what it was, wasn't it?

A. Yes, sir.

Q. And when you started out on your little Exhibit No. 27, that projection on the B-1 slab, you had a projected cost of $11,400.00; recall that?

A. Yes, sir.

Mr. Anderson: Is that cost?

Mr. Reutlinger: No, projected sales, you are right; you are right.

Q. Now, what you had discussed with your people, Mr. Miles and Mr. Smith and Mr. Robinson and with our people, Mr. Grayson and Mr. Mack, was a house and lot selling for $10,000.00 and of course the

(Vol. VI, p. 41)

difference is $1,400.00, isn't it?

A. That's right; we were going to try.

Q. Well, but I say, the difference is $1,400.00?

A. Why, yes.

Q. How much did you expect the basic package which was around $3,000.00 to be reduced by?

A. I don't recall our breakdown that we was working on at $10,000.00.

Q. Were you going to lower some of your land profit in this transaction?

A. I don't recall how we arrived at—in fact we never worked it out; never did get to that.

Q. You didn't anticipate or work on any of your profit; you simply talked to U. S. Steel about it; is that it?

A. I didn't; he had worked on the whole deal.

Q. Well, did you contemplate if you could get a $10,000.00 package to cut your projected land profit?

A. I don't recall.

Q. Did you contemplate if you could get a $10,000.00 package to cut the commission to

(Vol. VI, p. 42)

Zettowoch-Fortner?

A. I don't recall.

Q. When did you abandon the idea of marketing a $10,000.00 package which would include a package from the Credit—uh, from the Steel people?

A. When it included—

Q. (Interrupting) No. Well, yes, when did you quit dickering with them about a package which would give you about a $10,000.00 unit to sell?

A. I just don't recall that date.

Q. Well, you certainly were still talking about it on May 3rd of 1962. I'll take that back; you were talking about it on April 26th, 1962; this memo dated April 3rd refers to a meeting of April 26th; you still had it on your mind then, didn't you?

A. If that letter says—yes.

Q. All right. Well, it does say?

A. Yeah, that's right; we were just trying everything we knew how to make it go.

Q. I understand. Do you know how many packages you had bought, built and completed by April 26, 1962? You don't know offhand, do you?

A. No, sir.

Q. I suggest that you look at that

(Vol. VI, p. 43)

Exhibit "Sequence of events" which I furnished you and you will find that by that time you had taken delivery, built and completed fifty-four—as a matter of fact, the date of completion on the fifty-four was April 26th, 1962, home packages?

A. (Witness nodded head affirmatively).

Q. And if that exhibit bears this out that is what you had done?

A. Yes, sir.

Q. Now, we will just finish up with one or two little items; I believe the way you handled these transactions on

a contract basis was to, as you have told us, make a contract and order the home package and in almost everyone of these contracts which you have before you, you point out that you start building and that means obligating yourself as soon as you get F.H.A. credit clearance for the purchaser and that is understandable, isn't it?

A. That's right.

Q. I mean, you are not going out on a limb for me until you know that I can pay you?

A. I believe U. S. Steel agree to that too.

Q. Oh, absolutely.

(Vol. VI, p. 44)

A. They made that a must, yes.

Q. We want you to pay us; there's no doubt of that?

A. Yeah.

Q. And you can't pay anybody unless the money—unless the man who is going to buy the house can pay you, can you?

A. That's right.

Q. So that if a contract is made today then you go through a time-consuming process for checking the man's credit?

A. Yes, sir.

Q. And then when that is approved and you know you have got a deal that the man can live up to, you then order the house package?

A. I believe that's right.

Q. What you really do is, you order the package right away, but on these orders you always say, "Will notify"; that's the way you handled it?

A. I believe.

Q. All right. Now, I direct your attention to certain material regarding Lot 205, which we have designated as our Exhibit 98 and ask you if it doesn't show—this is our Exhibit 98,

(Vol. VI, p. 45)

designated as that, which shows on the face of it a closing sheet and shows apparently where Fortner Enterprises borrowed money from the Louisville Mortgage Service Company, is that corect; had a construction loan there?

A. Yes, sir.

Q. And part of Exhibit No. 98 shows a letter to Fortner Enterprises from the Louisville Mortgage Service Company under date of August 24, 1962, regarding a construction loan; is that right?

A. Yes, sir.

Q. And here is an invoice from the Homes Division which shows that on that lot, No. 205, they sold you a home package; that is your order?

A. Yes, order number, yeah.

Q. It shows that they shipped a home package on, it looks like September—

A. (Interrupting) Yeah.

Q. (Continuing)—September 4, 1962, and there is, of course, a shipping order or shipping invoice or dray ticket which indicates that Lot 205 was shipped in September of 1962; that correct?

A. Yes, sir.

Mr. Reutlinger: Ask that this

(Vol. VI, p. 46)

be filed as Defendants' Exhibit No. 98.

By the Court: Let it be filed.

(Whereupon, Defendants' Exhibit No. 98 was Received in evidence.)

Q. Do you know what date you brought this suit?

A. No, sir.

Q. Suppose I told you the record shows July 19, 1962; would that be about right?

Mr. Anderson: We will so stipulate.

A. Un-huh.

Q. Each of these transactions that you actually sold—the Zettwoch-Fortner Corporation got a commission on, didn't it?

A. Yes, sir.

Q. A commission in a real estate transaction, in general, is for services rendered, isn't it?

A. Yes, sir.

Q. And of course you had salesmen who were selling Fortner Enterprises' houses to the public generally?

(Vol. VI, p. 47)

A. Yes, sir.

Q. And they were working?

A. Yes, sir.

Q. And they got half of that commission, didn't they?

A. I think so.

Q. Well, didn't you tell us that earlier this week—last week?

A. If they did, that's what they got.

Q. They didn't get it all?

A. No.

Q. And the other part of that commission went to Zettwoch-Fortner?

A. That's right.

Q. And if you told us half last week that's what they got, Zettwoch-Fortner?

A. That's right.

Q. And the commissions that you took with each transaction or at the set rate that you projected on your Exhibit No. 27 starting at $300.00 and going up depending on the model; in some models as high as $400.00?

A. Whatever that says.

Q. Yeah, that—well, all right.

(Vol. VI, p. 48)

A. Yes.

Q. And the man, the actual salesman who made the deal got half of that commission for his work, no more, no less?

A. He and the sales manager together. I don't think I—

Q. (Interrupting) Well, the two of them, let's put it that way?

A. That's right.

Q. And Zettwoch-Fortner got the other half?

A. I believe that's right.

Q. Now, I would direct your attention to our Exhibit Nos. 42, 43, 47, 53, 58, 60, 62, 63, 68, 74, 81, 89, 90 and 92, all of which are purchase contracts, and you may even find some in here that are duplicates of yours, but it might be easier for me to find one here and you are at liberty to clarify this by looking at these exhibits.

By the Court: Gentlemen, we've been going about an hour. You can find these exhibits during the recess; we will take about ten minutes, ladies and gentlemen.

(Whereupon, at about the hour of 10:25 A.M. a recess was taken,

(Vol. VI, p. 49)

reconvening at about the hour of 10:42 A.M., and the following proceedings occurred.)

Q. (By Mr. Reutlinger continuing) Mr. Fortner, I will show you the sales contract portion of Defendants' Exhibit No. 43 and ask if in the upper right-hand corner you find a little statement which says like this:

"On acceptance of this contract place through Zettwoch-Fortner Corporation $10,000.00 insurance on this property",

and this particular one is signed by the same person who signed the purchase contract, Lillian Denzill; is that true?

A. Yes, sir.

Q. So, in this particular contract, our Exhibit No. 43,

you sold the people the house and then Zettwoch-Fortner, and that is you because you own it all, sold them some insurance, didn't you?

A. Yes, sir.

Q. And if my representation to counsel is

(Vol. VI, p. 50)

correct, you did that for some thirteen other contracts out of sixty-some odd we have before the Court; is that right?

A. Whatever the contract says, yes.

Q. Yes. Well, all right; whatever the contract says. Did Zettwoch-Fortner obtain any appraisal fees out of the Golden Meadows Subdivision?

A. I don't know as I follow that.

Q. Zettwoch-Fortner does appraisal work, doesn't it?

A. Yes.

Q. Did you, in connection with any of these transactions obtain any appraisal fees?

A. I don't recall any.

Q. Now, you put some of your own money in this transaction; A. B. Fortner, Jr., personally, didn't you?

A. I believe the—Ernst & Ernst shows that, yes.

Q. Well, now, Mr. Fortner, not what Ernst &Ernst shows.

A. Yes, our records show that, yes.

Q. My question to you is did you put some of your own money in this project?

(Vol. VI, p. 51)

A. We put some in for promotion, overhead, advertising and other things.

Q. You mean your money, A. B. Fortner, Jr., personally?

A. Yes.

Q. And did Iroquois Developers put some money in this transaction?

A. Yes, sir.

Q. And I believe Iroquois Developers put in something like $33,000—about $33,000.00 in round numbers?

A. Yes, sir.

Q. And you put in personally $25,000.00 in round numbers?

A. Yes, sir.

Q. And that was money you had loaned your corporation for working capital?

A. Yes, sir.

Q. Did you pay any of that back?

A. I believe the records show there was some paid back.

Q. Isn't it a fact that in February of 1961 Fortner Enterprises paid back Iroquois Developers some $10,000.00?

(Vol. VI, p. 52)

A. If that's what the record shows—I know we paid—I assume it's right.

Q. Well, yes, that is unfair to you because—

A. (Interrupting) Well, I take it—it's right.

Q. I mean all right; you are right?

A. Yes.

Q. I mean you can't—

A. (Interrupting) That's all right.

Q. And isn't it true that the records show, and if the record so shows, I assume this will be your recollection?

A. (Witness nodded head affirmatively).

Q. That Fortner Enterprises, and you own all of the stock in it, paid back A. B. Fortner, Jr., $11,200.00 of that—no—uh, yes, paid back about $11,000.00—no, paid $13,800.00 back?

A. Yes.

Q. Where did the Fortner Enterprises get that cash to pay back those advances you made for working capital?

A. Well, we just, uh, lent it to them. We probably didn't because—I don't really know.

(Vol. VI, p. 53)

Q. Where did they get money to pay you back?

A. Well, they had money because we lent it to them.

Q. You took it out of your overhead and working capital?

A. I really wouldn't know how we paid it back until we check it; I just don't know.

Q. Well, it is true that at least Ernst & Ernst's audit shows that the $10,000.00 payment here, payment to Iroquois Developers was in February of 1961 and that you, acting through Fortner Corporation, paid yourself back in late 1961 and in early 1962, $13,800.00; if the record shows this you will concede this is correct?

A. Yes, sir.

Q. You did borrow money in August of 1961, the second transaction, from the Credit Corporation, didn't you?

A. Yes, sir.

Q. At the time you walked away from this project which was sometime in June or July of 1962, you still had at your disposal the Zettwoch-Fortner Corporation, didn't you; you owned it all at that time?

(Vol. VI, p. 54)

A. Yes, sir.

Q. And at that time because you had earlier bought Mr. RoBards out you still had at your disposal the Iroquois Developers, didn't you?

A. Yes, sir.

Q. And at that time you still had at your disposal the Fortner Homes?

A. Yes, sir.

Q. And you have earlier told us that you had other personal assets of your own?

A. Yes, sir.

Mr. Reutlinger: That is all of the questions I have of

this witness on cross-examination, however, if Your Honor please, he is under subpoena to us and we would like his attendance throughout the trial.

By the Court: All right.

Mr. Anderson: He will sure be here.

Redirect Examination by Mr. Kennth L. Anderson

Mr. Anderson: I have one

(Vol. VI, p. 55)

question, Mr. Fortner; Mr. Reutlinger, in the course of cross-examination, read a portion of an answer to an interogatory which you had signed on behalf of Fortner Enterprises.

That was in response to the portion which he read—was part of the response to Interrogatory 1, which was served on myself and Mr. Hamilton, as counsel for Fortner Enterprises, on March 17th, 1970.

The interrogatories, so that everybody will understand, read as follows:

> "Please list each fact and premise, including firm bids or contracts, denominating same as "Fact" or "Premise" when listed, on which plaintiff bases its conclusion that it was caused to lose profits on homes built or to be built by plaintiff in the amount of approximately $900.00 per each of the two hundred nineteen houses."

Now, I would like to read the entire answer to the interrogatory of which Mr. Reutlinger read a part:

(Reading) "See the answer to

(Vol. VI, p. 56)

> Interrogatory 4-E served on counsel for defendants on October 26, 1962. Plaintiff claims that each of the factors set forth in Paragraph 17 and all subparts of said paragraph of the complaint and set forth in Para-

graph 5 and all subparts of said paragraph of the amended complaint contributed to the loss of profits in the amount of $900.00 per each of the two hundred nineteen houses.

"At the inception of the project, all prime costs for land and construction were computed on the basis of known cost or reliably estimated costs.

"These costs were initially computed on the basis of figures prepared by defendant Homes Division and were modified by plaintiff to meet the circumstances of the subject subdivision. The houses were then priced to produce at least a $900.00 profit per house.

(Vol. VI, p. 57)

"Copies of the cost estimates originally prepared by Defendant Homes Division and cost estimates subsequently prepared by or for Fortner Enterprises, Incorporated, have been designated as exhibits by plaintiff and were so designated in June, 1966, and exhibited to counsel for defendants at that time.

"The bookkeeping records kept on a house-by-house basis show a profit in most of the houses actually sold by plaintiff. However, as a result of the repeated callbacks required to correct problems caused by the defects and inadequacies of the house packages, work on new homes could not be accomplished on the schedule originally contemplated by the parties and the loan documents.

"Subcontractors became dissatisfied and as a result slowed the work down. They also attempted to seek extra compensation for the extra work required, but plaintiff

(Vol. VI, p. 58)

in many instances was able to persuade them out of

making such charges. In spite of that, certain extra charges were made.

"The many deficiencies, defects and problems with the Homes Division house packages are set forth in the answer to Interrogatory 3-C served on counsel for defendants on October 26, 1962.

"Additional evidence of same appears in the exhibits which plaintiff identified as possible trial exhibits in June, 1966. A number of the witnesses identified as witnesses for the plaintiff will likewise testify about the deficiencies, defects and problems, as well as about the delays in completion and meeting schedule and as well about the complaints and as well about the loss of reputation of the subdivision which resulted in a slowdown of sales and inability to sell the houses.

(Vol. VI, p. 59)

"There will also be testimony about the discouragement and loss of morale of the sales force as a result of the complaints, delays and loss of reputation and sales.

"The defects and deficiencies and problems connected with the Homes Division house packages caused repeated delays in obtaining final approvals by F.H.A. inspectors. The F.H.A. inspectors eventually did approve the houses although the most serious problems such as wavy walls were not and could not be solved. The reasons for these approvals are not fully known by plaintiff.

"The delays in completion of houses and starts of new houses and loss of reputation and resulting losses in sales all caused the general interest on the obligations to the defendant, Credit Corporation, to consume the profits made on the houses which were sold and placed the plaintiff in

(Vol. VI, p. 60)

jeopardy.

"The plaintiff was required to purchase the house package from Homes Division at prices set by Homes Division and these prices were unreasonably high. Exhibits already designated and witnesses already identified will establish this point. Plaintiff was rendered incapable of selling such houses as set forth above.

"Defendants refused to relieve plaintiff of the requirement that the house packages of Homes Division had to be used on each lot in the subdivision even though conventional houses or other prefabricated houses could have been built at less expense and of better quality.

"Since the houses using the Homes Division package could not be sold and since the profits from those houses already sold had been wiped out, all as a result of the illegal agreements and conduct of the

(Vol. VI, p. 61)

defendants, plaintiff was forced to cease work in the subdivision and therefore lost profits in the programmed minimum amounts on each lot not built upon in said subdivision.

"All of the above facts or premises upon which the plaintiff relies in establishing its loss of profits in this case.

"Certain accounting exhibits have previously been shown counsel for defendants and certain additional exhibits are available for inspection as well as the accounting ledgers maintained by plaintiff's accountant, John D. Cooper, Jr., William S. Wetterer & Company, 3011 Preston Highway, Louisville, Kentucky.

"Counsel for defendants has previously examined and copied the files of each house built by plaintiff and has all of the actual bills which plaintiff has on each such house. These bills confirm the costs in most,

(Vol. VI, p. 62)

if not all cases, as set forth on the original cost projections, which have also been furnished defendants.

"All exhibits identified by plaintiff in June, 1966, have also been made available to counsel for defendants."

Now, Mr. Fortner, was that the complete answer to the interrogatory from which Mr. Reutlinger read?

Mr. Fortner: Yes, sir.

Mr. Anderson: That's all I have.

Recross Examination by Mr. Albert F. Reutlinger

Mr. Reutlinger: Who prepared this answer, Mr. Fortner?

Mr. Fortner: Mr. Anderson and Mr. Hamilton and myself.

Mr. Reutlinger: All right.

By the Court: You may stand aside.

(Witness excused)

(Vol. VI, p. 63)

(Whereupon, at this point Counsel for Plaintiff, MR. KENNETH L. ANDERSON, ESQ., took the witness chair and the following proceedings occurred.)

• • • • • • • •

(Vol. VI, p. 64)

Mr. Anderson: If the Court please, I had previously offered into evidence plaintiff's Exhibit No. 238 and at this time I would like to read from certain additional portions of this particular exhibit.

Colloquy

First I will read the letter from Mr. D. H. Boyd, President of the United States Steel Homes Division to Mr. Merrill Russell, Assistant General Solicitor, United States Steel Corporation, as follows:

"Dear Mr. Russell:

"The attached material from H. R. Black, Vice-President-Sales, will doubtless be of interest by way of providing a perspective of the Louisville Home Building Market and our participation in the past several years.

"You will also be interested in knowing to what extent and in what manner representatives of U. S. Steel Homes Division offer the services and assistance of U. S. Steel Homes Credit Corporation to its builder-customer such as A. B. Fortner, and

(Vol. VI, p. 65)

others.

"Enclosed is a copy of that section of our Salesman's manual which deals with the subject and sets forth the position of our division in so far as regular sales contacts with customers and prospective customers are concerned. As you know, we regularly do business with franchised builders from whom no financing assistance is requested of U. S. Steel Homes Credit Corporation. Thus far in 1962 these dealers have accounted for thirty percent of our unit volume.

"Beyond the regular program of financing assistance offered to qualified builders and negotiated by the Credit Corporation their exists a program of special assistance which provides a greater amount of interim financing participation in selected markets with selected dealers.

"Fortner represents one of the latter. In these cases our Sales

Colloquy

(Vol. VI, p. 66)

Department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel homes with a dealer who is believed to have the necessary qualifications to be successful.

"Frequently, the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance.

"In certain cases where Credit Corporation states that the amount of assistance provided in relation to the

(Vol. VI, p. 67)

value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category.

"We do not require builders to utilize the financing service of our Credit Corporation. The relatively high degree of our volume so supported result from requests on the part of the builder rather than pressure on the part of our sales personnel.

"In the case of Fortner Enterprises, although our Sales Department actively sought the business, Mr. Fortner obviously had several choices of prefab manufacturers who are actively shipping homes into the Louisville market, based on the best information we

have. In addition there was the conventional method of building in the local market.

"Local financing institutions such

(Vol. VI, p. 68)

as banks and savings associations also offer financing assistance to home builders. Loans for this purpose are generally conditioned on approval by the lending institution of specific plans for land, its development, and the houses to be erected and sold.

"Frequently the purpose of these loans is to obtain long term mortgages for the financial institution and the builder must direct his home buyers to place their mortgage loans with the institution which is supporting his operation. If there is any additional information which will be of assistance to you please let me know."

Now, the next document, which is attached to this letter and part of Exhibit 238, is a memorandum from Andrew Cowart to Harry R. Black, dated July 31, 1962, and the subject is Louisville Housing Information.

(Reading):

"In accordance with your request, I have assembled the housing

(Vol. VI, p. 69)

data relative to the Louisville Marketing Area over the last few years. Attached are the following lists.

"One. Housing starts in Louisville market. This information is based on building permits issued in all incorporated areas in Jefferson County.

"2. Manufactured homes in Louisville market. This list is comprised of all the home manufacturers who have shipped houses into Louisville, according to the Associated Home Builders of Louisville. This list is complete to the best of their records and knowledge.

"3. United States Steel Homes shipped into Louisville market. This is broken down by dealerships covering the period from January 1, 1959, to date."

Now then, attached to that are the memoranda that I have just described. The first one is also dated July 31, 1962. It is headed "Housing, starts in Louisville market". (Reading):

"Based on building permits

(Vol. VI, p. 70)

issued for single-family dwelling units in all incorporated areas in Jefferson County."

Then, under that it has three columns and under the first column, it's 1960, 3,144 housing starts; for 1961, 3,201 housing starts, and then in 1962, to date, which is July 31st of 1962, 2,035 housing starts.

Turning to the next document, which is a listing of the home manufacturers shipping into the Louisville market, this lists the Empire Homes, Tru-Bilt Homes, National Homes Corporation, Richmond Homes, Incorporated, Scholtz Homes, Incorporated, Kingsberry Homes Corporation, Pease Wood Work Company, Inland Homes Corporation, Swift Homes, and Jim Walters Homes Corporation.

Then, it has underneath that:

"The Associated Home Builders of Louisville estimate that at least twenty percent of housing starts are manufactured homes—balance conventionally built on site."

Now, the last document is also dated July 31, 1962, and it reads:

"United States Steel Homes shipped

(Vol. VI, p. 71)

into Louisville market."

And it has columns for the years 1959 through 1962, to date, and of that I am going to read the portion which pertains to—no, let's read them all.

First, we have the A. W. Brent Company; 1959, zero; 1960, one; 1961, zero; 1962 to date, zero.

Eagles Company; 1959, zero; 1960, zero; 1961, seven; 1962 to date, twenty-one.

Fortner Enterprises, Incorporated, 1959, zero; 1960, three; 1961, fifty-five; 1962 to date, eleven.

O. K. Company; 1959, zero; 1960, three; 1961, seven; 1962 to date, zero.

Town & Country; 1959, zero; 1960, zero; 1961, four; 1962 to date, four.

Next, I would like to read from Plaintiff's Exhibit No. 1, which is the request for admissions which has been previously introduced into evidence, reading Paragraph 61, which is as follows:

> "That the documents attached to the Certificate of B. L. Rawlins, Secretary of United States Steel Corporation, dated April 23, 1964.
>
> **(Vol. VI, p. 72)**
>
> are true and correct copies of minutes included in the minutes of the Finance Committee and Board of Directors of United States Steel Corporation and that said documents were prepared and maintained by United States Steel Corporation in the regular course of business."

Now, from the attached documents which that identifies I am going to read from the Finance Committee meeting minutes of December 16, 1958.

(Reading):

> "There was presented a report summarizing the financial transactions and results of U. S. Steel Homes Credit Corporation.

"There was also presented a report on the proposed operations in 1959 of United States Steel Homes Division of the Corporation and a proposed program of U. S. Steel Homes Credit Corporation whereby for the purpose of enabling the Homes Division, one, to attain a minimum distribution of one thousand eight hundred units in

(Vol. VI, p. 73)

1959 and such conditional distribution as may be feasible, and, two, to enlist and maintain the support of and assistance of selected dealers in the development and testing of steel components, and when specially requested by the Homes Division;

"A. The Credit Corporation, in instances in which its present programs of loans, mortgage commitment issuance, and mortgage commitment procurement prove inadequate to effectuate the above purposes, would extend the following financial assistance to dealers in addition to its present programs:

"I. Make loans to or for the benefit of dealers or enter into other forms of transactions designed directly to effectuate the above purposes, without conformity with conventional or conservative patterns, but within the bounds of prudent business judgment.

(Vol. VI, p. 74)

"II. Issue commitments for the purchase of F.H.A. insured and V.A.-guaranteed mortgages at fixed discount expense, and hold and liquidate mortgages acquired thereunder as promptly as may be practicable with minimum loss, if any, consistent with the limitation of the $33,000,000.00 revolving fund, provided;

"B. That the Homes Division underwrite and guarantee all loss incurred in the liquidation of mortgages acquired under any commitments providing fixed dis-

count expense, to the extent which such loss may exceed the loss which would have been incurred if the commitments had provided fixed discount expense corresponding with that fixed generally by institutional issuers of stand-by commitments, as determined by the Credit Corporation at the time of issuance of the commitment. After discussion, on motion duly seconded,

(Vol. VI, p. 75)

it was unanimously resolved that the proposed program of loans and commitments by U. S. Steel Homes Credit Corporation outlined in the preamble to this resolution be, and hereby it is, recommended.

"Resolved, that acceptance by United States Steel Homes Division of United States Steel Corporation of the condition outlined in Paragraph B in the foregoing preamble be, and hereby it is, authorized."

Now, that concludes that minute and I would now read the Finance Committee meeting minutes of August 25, 1959.

(Reading)

"There was presented a report summarizing the financial transactions and results of U. S. Steel Homes Credit Corporation.

"There was also presented a report on the effects of the 1959 financial program on the sale of homes by United States Steel Homes Division of the Corporation and a

(Vol. VI, p. 76)

proposal to continue the financing assistance program recommended for 1959 by the Finance Committee December 16, 1958, with the understanding that the special financing program may be called upon to support 1,600 sales for 1960 in an effort to assist United

States Steel Homes Division in reaching a 2,500 units sales objective in 1960 or to support more sales if such objective is exceeded.

"After discussion, on motion duly seconded, it was unanimously resolved that the continuance during 1960 of the program of loans, and commitments by U. S. Steel Homes Credit Corporation referred to in the resolution of the Finance Committee of December 16, 1958, to be, and hereby it is recommended."

Now, I think that covers that point. Now, I would like to read from Paragraph 59 of the Requests for Admissions to U. S. Steel Corporation and it

(Vol. VI, p. 77)

reads as follows:

"That the attached two-page "Standard conditions of sale" is a true and accurate copy of the "Standard conditions of sale" of the Homes Division of United States Steel Corporation in effect from August, 1960, through June, 1962."

And then from the Standards of conditions of sale, I want to read two portions, first, Paragraph 14, "Change in price",

"Company has the right, at any time, without notice, to issue new price lists and to change the price and terms and conditions therein contained with respect to Company products."

And then, Paragraph 22:

"Change of products; Company reserves the right to make changes or omissions in unshipped homes without notice and without obligation to make such changes or omissions on homes already shipped, and thus does not

(Vol. VI, p. 78)

guarantee that each home shipped will, in each and every particular, conform to catalogues, advertising, literature, plans, drawings and descriptions of material that may be in circulation at any time.

"Specific details, dimensions or other information set forth in catalogues, advertising, literature, plans, drawings and descriptions of materials supplied by the Company have been obtained as a result of research or from sources believed to be reliable, but Company assumes no responsibility in dealers use thereof."

Next, I would like to read Paragraph 4 of the request for admissions.

"That Document 54 is a four-page memorandum from N. G. Day, Manager of Field Sales, United States Steel Corporation, to Harry R. Black, General Manager-Sales, dated December 22, 1959, and that said document was prepared and maintained in the regular

(Vol. VI, p. 79)

course of business by United States Steel Corporation."

Now, I would like to read Plaintiff's Exhibit No. 54 which is Document 54 described in Paragraph 4 which I have just read.

"Fortner Enterprises is a proposed new borrower operating in the Louisville, Kentucky, area. This is a corporation solely owned by Mr. A. B. Fortner, Jr., President of Zettwoch-Fortner Corporation, which Company is actively engaged in home building, land development and the real estate business. Fortner Enterprises is presently an inactive corporation with limited assets. They propose, however, to transfer assets from another corporation to Fortner Enterprises. These assets will consist of ninety-six unde-

veloped lots and three developed lots with a total value of approximately $112,000.00 and a liability of $56,000.00 which represents one-half of the land value.

(Vol. VI, p. 80)

"Mr. Fortner, along with another individual, has been building in a project known as Golden Meadows Subdivision, and to date has completed two hundred fifty homes in the $10,000.00 to $15,900.00 class. The value and quality is excellent.

"We have been in contact with Mr. Fortner and his associates for the past three weeks. They have attended one of our seminars, visited our plant, and are presently assembling cost figures on our product.

"Mr. Fortner has been in the real estate and development business since 1939, and is very highly regarded in Louisville. Built personally about seventy-five homes—has mostly developed ground for captive builders and merchandised and sold the homes on about four thousand lots.

"Project and location. The project is just off Dixie Highway,

(Vol. VI, p. 81)

approximately eleven miles from downtown Louisville. Immediately served by large shopping area, schools and transportation. It is very well situated with fast access to downtown Louisville.

"The land in question totals ninety-nine lots—ninety-six undeveloped and three developed. This is presently owned by Iroquois Development, Incorporated, of which Mr. Fortner owns a one-half interest. It will be necessary for Mr. Fortner to purchase the remaining one-half interest in the corporation in order to transfer title to the borrowing corporation.

"In addition to the aforementioned land, Mr. Fortner is optioning an adjoining ninety-acre tract for

future development and probable construction of our homes. It is planned to build in the $10,000.00 to $11,500.00 class. It is estimated that F.H.A. value on

(Vol. VI, p. 81)

approximately eleven miles from downtown Louisville. Immediately served by large shopping area, schools and transportation. It is very well situated with fast access to downtown Louisville.

"The land in question totals ninety-nine lots—ninety-six undeveloped and three developed. This is presently owned by Iroquois Development, Incorporated, of which Mr. Fortner owns a one-half interest. It will be necessary for Mr. Fortner to purchase the remaining one-half interest in the corporation in order to transfer title to the borrowing corporation.

"In addition to the aforementioned land, Mr. Fortner is optioning an adjoining ninety-acre tract for future development and probable construction of our homes. It is planned to build in the $10,000.00 to $11,500.00 class. It is estimated that F.H.A. value on

(Vol. VI, p. 82)

the lots will be approximately $2,200.00.

"Final figures for cost of development have not yet been established. Based on past experience of the developer, the fixtures are very close to accurate. A release value equal to F.H.A. valuation of the lots was suggested by the dealer. Current valuations are approximately $2,200.00 per lot."

Then, they give an estimated breakdown here of figures of ninety-six lots at $105,600.00, three lots at $2,100.00 each for $6,300.00, a total of $111,900.00. The cost to develop ninety-six lots of $1,000.00 is $96,000.00. The total land development, $207,900.00 than the borrowers' equity in land, $55,950.00 and the net required, $151,950.00.

"The area is partially surrounded by new homes and all the necessary utilities are on the site. The suggested $2,200.00 release value would pay back the entire loan over the first sixty-nine lots. The

(Vol. VI, p. 83)

ninety-nine home sales would be considered as a year's program or less.

"It is planned to erect three models on the three improved lots as soon as F.H.A. conditionals are received, and a sales program opened at that time.

"It is acknowledged that their request for financing is definitely in the category of special financing, but there are many advantageous features which, I feel, make this program possible, and I would recommend your consideration.

"It is the recommendation of the Sales Department that this request be forwarded to the Credit Corporation for their consideration in granting the necessary financing to establish this new program.

"In addition to Mr. Day's and Mr. Grayson's examination of this prospective dealer, I, too, have

(Vol. VI, p. 84)

had the opportunity to discuss this program in full with the principals as well as our own fieldmen, and find that from a commercial viewpoint the program is most desirable. Although in discussing a program such as this we make every effort to avoid complete details of the financing, it is natural that some figures are suggested by the dealer, and these we pass on purely as a guide for what we think it will take to establish the program.

"It is evident that models could be erected possibly within the next thirty to sixty days, and a sales program opened at that time. This, of course, would be

most beneficial because the Louisville area can accomplish winter building without too much difficulty.

"This new dealership will not interfere with the program which we are currently working on with

(Vol. VI, p. 85)

Town & Country Homes. It is approximately fifteen miles away from Town & Country's contemplated project and in an entirely different section of the city. Fortner's program will be in the $11,000.00 to $13,000.00 price range whereas Town & Country Homes will be in the $15,000.00 to $20,000.00 price range.

"There is attached a copy of credit information which I have discussed with Mr. Kestner today. Mr. Kestner is making an immediate check of the bank and trade references and is also ordering a Dun & Bradstreet Report. This information should be available to Mr. Kestner's office no later than Monday, December 28th.

"The Sales Department would appreciate the opportunity of meeting with the Credit Corporation and the dealer to discuss this program as soon as possible.

(Vol. VI, p. 86)

"The franchise has been signed by the builder, and this along with an operating statement of the borrower will be available to the Credit Corporation at the time of their discussion with Fortner Enterprises."

Next, I would like to read Paragraph 5 of the Request for Admissions:

(Reading)

"The Document 138 is a one-page letter from David H. Boyd, President of U. S. Steel Corporation, Homes Division, to W. H. Lang, President of the United States Steel Homes of the United States Steel Homes Credit Corporation, dated December 30, 1959, and that

said document was prepared and maintained by the U. S. Steel Corporation in the regular course of business."

Then, I would like to read Plaintiff's Exhibit No. 138, which is a letter. It is:

(Reading)

"Dear Mr. Lang:

"Attached hereto is a copy of the Sales Department's recommendation

(Vol. VI, p. 87)

to this office concerning Fortner Enterprises, associated with Zettwoch-Fortner Corporation, Louisville, Kentucky.

"After reviewing this recommendation and the background financial information available from the Treasury Department, it is my judgment that this builder warrants further consideration of the financial aspects of the attached.

"I would recommend, therefore, that the Credit Corporation enter into financial negotiations with Fortner Enterprises, subject to the usual prudent judgment and the hope that an agreement can be reached which will assist in providing additional shipments in the Louisville, Kentucky, area for 1960.

"Copies of the detailed back-up material are being forwarded promptly to Mr. Dyas through our Treasury Department."

Next, I would like to read Request for

(Vol. VI, p. 88)

Admission No. 6:

(Reading)

"The Document 71 is a one-page letter from W. L. Rollins, District Representative of the U. S. Steel

Homes Credit Corporation to Harry R. Black, General Manager, Sales, of the United States Steel Corporation, Homes Division, dated January 7, 1960, and that said document was maintained by U. S. Steel Corporation in the regular course of business."

Then, I would like now to read Plaintiff's Exhibit 71, which is the identified letter:

(Reading)

"Enclosed herewith for your review is a copy of memorandum covering the main points of the discussion with Mr. Fortner in the meeting of January 6, 1960.

"You will note that the program involves substantial changes from that originally proposed by Mr. Fortner and, therefore, if same is acceptable to you on the basis now

(Vol. VI, p. 89)

proposed would you please so indicate on the attached copy of this letter."

Next, I will read Paragraph 7 of the Request for Admissions:

(Reading)

"The Document 51 is a one-page memorandum prepared by W. L. Rollins, of United States Steel Homes Credit Corporation; that it is the memorandum described in Document 71 and that said document was maintained by United States Steel Corporation in the regular course of business."

Now, Document 51, which is now Plaintiff's Exhibit No. 51 reads as follows:

(Reading)

"January 7, 1960.

"Re: Fortner Enterprises, Louisville, Kentucky. On January 6, 1960, a meeting was held with Mr. A. B. Fortner, Jr., attended by Messrs. Day, Grayson and Cowart of the Homes Division and Dyas and Rollins of the Credit Corporation for the purpose of discussing the financial request which was the

(Vol. VI, p. 90)

subject of Mr. Boyd's letter of December 30, 1959.

"At such meeting it developed that Mr. Fortner had completely changed his proposal as originally made to the extent that he desires a loan commitment covering the entire project of one hundred fifty-five undeveloped lots and approximately thirty-one fully developed lots. Mr. Fortner indicated that the only way that he would proceed in this undertaking would be on the following basis:

"Financing for the acquisition by Fortner Enterprises from Iroquois Development Corporation of one hundred fifty-five undeveloped lots at a cost of $1,100.00 per lot, or $170,500.00 with Fortner's equity to be the thirty-one fully developed lots at $2,000.00 per lot, or $62,000.00.

"Financing for the development of the one hundred fifty-five lots

(Vol. VI, p. 91)

at $900.00 per lot, or $139,500.00. The initial development to be undertaken on sixteen lots at a cost of $14,400.00 which, together with the thirty-one improved lots will provide Fortner with forty-seven improved lots. When sales are in hand on one-half of the improved lots, development can be undertaken on the one hundred thirty-nine remaining undeveloped lots.

"Construction financing on the total of one hundred eighty-six lots aggregating approximately

$1,400,000.00 to be dispersed in stages as construction progresses and as houses are contracted for sale.

"A "Ride the F.H.A. market" take-out commitment on the one hundred eighty-six lots, amounting to approximately $2,000,000.00.

"The land in question is located in an existing subdivision, Golden Meadows, where some two hundred fifty

(Vol. VI, p. 92)

houses have been completed to date. The property was acquired by Iroquois Development Corporation five years ago after having been optioned three years previously at a cost of $1,100.00 per acre as farm land. There can, of course, be no question as to the appreciation in land values after the installation of off-site utilities and the development of the tract from raw land to an existing subdivision of several hundred homes.

"Should it be decided to proceed on the basis requested by Mr. Fortner, it would be contingent upon a prior determination by him that our house can be profitably built and the receipt of satisfactory financial statement of Fortner Enterprises."

Next, I would like to read Paragraph 9 of the Request for Admissions:

(Reading)

"The Document 137 is a one-page memorandum from R. C. Dyas, Vice-President of United States Steel

(Vol. VI, p. 93)

Homes Credit Corporation, to W. H. Lang, President of United States Steel Homes Credit Corporation, dated March 3, 1960; that said document was delivered to the U. S. Steel Credit Corporation and maintained by it in the regular course of business."

Now then, I would like to read Plaintiff's Exhibit 137, which is the copy of the memorandum I just identified. It is entitled "Memorandum to W. H. Lang from R. C. Dyas."

(Reading)

"Acquisition and development, $310,000.00. Date, March 3, 1960.

"I have discussed the subject application by telephone with Mr. Boyd, pointing out the possibility that the dealer's lack of experience in the use of our product might result in a failure of this project in the eventual acquisition of the project real estate by the Credit Corporation.

"Mr. Boyd expressed his

(Vol. VI, p. 94)

willingness to assure the Credit Corporation that in the event the project real estate should be so acquired, the Homes Division would take immediate action to place the property into production, either through activity by the Construction Department or some other dealer in the area, or a combination of both.

"Mr. Boyd understands that maturity of the loan must be sufficiently extended to provide for a two-year building program."

Now, that shows a copy to Mr. D. H. Boyd and if the Court please, I would like to offer into evidence all of the exhibits which I have identified up to this point.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 238, 1, 54, 138, 71, 51 and 137 were received in evidence.)

• • •

(Vol. VI, p. 95)

Mr. Anderson: And if the Court please, I would also like at this time to offer into evidence Plaintiff's Exhibit

No. 45, which is a blowup of the last document which I just read into evidence.

By the Court: All right; let it be filed.

(Whereupon, Plaintiff's Exhibit No. 45 was received in evidence.)

Mr. Anderson: Now then, I would like to read Paragraph 29 of the Request for Admissions:

(Reading)

"The Document 67 is a two-page memorandum from Neal G. Day of the Homes Division to Harry R. Black of the Homes Division, dated July 11, 1960, and that said document was prepared and maintained in the regular course of business by the United States Steel Corporation."

Now, I would like to read Plaintiff's Exhibit No. 67, which is Document 67.

(Reading)

"Earlier this year the Credit

(Vol. VI, p. 96)

Corporation met with A. B. Fortner, Jr., of Fortner Enterprises, Incorporated, negotiated a land and construction loan and subsequently drew up an agreement covering one hundred eighty-six lots in Golden Meadows Subdivision, Jefferson County, Kentucky. Execution of this agreement by Mr. Fortner was contingent upon his ability to purchase the interest in this subdivision, of Mr. William RoBards. At that time it appeared that this had been arranged.

"It later developed that Mr. RoBards wanted either to continue as half-owner or to purchase the interests of Mr. Fortner, and did not wish to sell his interests.

"On Tuesday, July 5, along with Sales Representative Paul Grayson, I met with Mr. Fortner and Mr.

RoBards at which time they informed us that Mr. RoBards was now buying the interests of Mr. Fortner, retaining the name

(Vol. VI, p. 97)

Fortner Enterprises, Incorporated, and requesting the same financing arrangements originally negotiated with Mr. Fortner. The principal change in the program is that now Mr. Robards will be President and sole owner of Fortner Enterprises, Incorporated, in place of Mr. Fortner thus requiring this new request."

I will now skip some of this as it is about Mr. RoBards' situation, and over on the second page it has:

(Reading)

"The financing request is also exactly the same as that requested previously and on which a Loan Agreement was drawn. The borrower requests that the same arrangements be made without exception.

"It is my opinion that this program has excellent commercial value to the Homes Division for the following reasons;

"Thirty-one lots are fully developed and ready for use. Balance

(Vol. VI, p. 98)

are plotted and F.H.A. approved.

"F.H.A. commitments have been obtained for four models so that these could be built immediately and a program started yet this summer.

"Mr. Fortner's organization, Zettwoch-Fortner Company, would still handle sales promotion, advertising, processing and so forth. They have a wide experience and a good reputation in this field.

"The organization is set up, land ready, model commitments received, and program ready to go upon approval of this request.

"I therefore request your earliest consideration and recommendations to the Credit Corporation on this request."

Now then, Paragraph 31 of the Request for Admissions:

(Reading)

"That Document 18 is a two-page United States Steel financial assist request, dated May 29, 1961, prepared by Paul Grayson and Neal G.

(Vol. VI, p. 99)

Day of Homes Division; that said document, or the original of same, were delivered to the Credit Corporation and was prepared and maintained in the regular course of business by United States Steel Corporation."

This is a document that has as its subject, Fortner Enterprises, Incorporated, dated 5-29-61, and the number of lots, thirty-one, loan agreement request, $54,000.00, and under condition and trend of market, rate of future sales competitive situation, and so forth it has, program going well in Golden Meadows, forty-plus sold to date with six sold in June, 1960. Aggressive program. Sales holding up well.

Now, Request for Admission No. 32; that Document 16 is a one-page memorandum from Harry R. Black, Homes Division, to David H. Boyd, Homes Division, dated June 5, 1961, said document was prepared and maintained in the regular course of business by the United States Steel Corporation and Document 16, which is Plaintiff's Exhibit 16 reads as follows:

(Reading)

"June 5, 1961. The attached request for Fortner Enterprises,

(Vol. VI, p. 100)

Incorporated, should allow us to achieve additional

shipments into the Louisville area during this construction season. Mr. Day's report is complete and provides adequate information for our consideration.

"The loan request is actually to pay off the mortgage on the improved lots and to acquire additional capital as necessary by the Fortner Corporation.

"As I have informed you in the past, Fortner Enterprises has expended large amounts of money in advertising and promoting the project. As a matter of fact, they did one of the outstanding promotional jobs that I have seen in the past year.

"The market in the Louisville area has responded well to this promotion and although delays were encountered due to bad weather the program is now rolling and we have

(Vol. VI, p. 101)

accomplished in excess of forty sales to date.

"The loan on the improved lots as presented will not only assist him in this capital requirements, but should provide additional immediate funds because of the improved condition of the lots.

"It is the recommendation of the Sales Department that the Credit Corporation meet with the principals of Fortner Enterprises, Inc. and negotiate this request."

Now then, reading from Request for Admissions No. 10;

(Reading)

"The Document 43 is a two-page memorandum from N. G. Day of the United States Steel Corporation Homes Division, to Harry R. Black, of the United States Steel Corportion Homes Division, dated September 19, 1960, and that said document was prepared and maintained by United States Steel Corporation in the regular course of business."

Colloquy

(Vol. VI, p. 102)

I have skipped around here and I am sorry for that, from a date standpoint and this one is dated September 19, 1960, going back to the first transaction:

(Reading)

"On December 22, 1959, I submitted a financing request to you on behalf of Fortner Enterprises, Incorporated, Louisville, Kentucky, covering one hundred eighty-six lots in the Golden Meadows Subdivision. At that time the land in question was owned by a corporation known as Iroquois Development, Incorporated, with ownership held equally between Mr. A. B. Fortner, Jr., and Mr. William RoBards. Mr. RoBards had agreed to sell his interest to Mr. Fortner and an agreement with the Credit Corporation was reached on that basis.

"Models were selected, costs established and submissions were made to F.H.A. for model homes for which satisfactory commitments were eventually received.

(Vol. VI, p. 103)

"It appeared that the program was ready to go, then Mr. RoBards decided that it looked too good for him to relinquish his interest. This caused considerable delay and the agreement had to be extended and eventually allowed to expire.

"Since they were at an impasse, Mr. Fortner decided to sell his interest to Mr. RoBards, subject to Mr. RoBards' ability to obtain the same financing arrangements from the Credit Corporation. As you know, our Treasury Department investigated and found that they could not recommend Mr. RoBards for financing.

Colloquy

"Since that time I have met with both principals and Mr. RoBards has now definitely agreed to sell his interest to Mr. Fortner and step out of the deal entirely.

"Therefore, in a pursuant meeting with Mr. Fortner, he has stated that it is his desire to reinstate the original request and agreement, and

(Vol. VI, p. 104)

if approved, proceed at once on construction of models and opening of a sales program.

"You will recall that there are thirty-one lots completely developed and ready for use, with one hundred fifty-five to be developed. It is strongly felt that the thirty-one homes can be sold and shipped in 1960 with the one hundred fifty-five for a 1961 program. This will still give us our fastest entry into the Louisville market this year.

"I have met and discussed this program with Mr. Fortner on several occasions and am convinced of his ability, enthusiasm and sincerity. He has the building organization, sales and promotion people, and financing know-how to make this program successful.

"I respectfully request your earliest consideration of his request and your recommendations to the Credit

(Vol. VI, p. 105)

Corporation."

Next, I would like to read Paragraph 11 of the Request for Admissions.

(Reading)

"That Document No. 42 is a one-page memorandum from Harry Black, General Manager, Sales, of United States Steel Corporation, Homes Division, to W. L. Rollins, Assistant General Manager, Credit Corpora-

tion, dated September 22, 1960, and that said document was prepared and maintained by the U. S. Steel Corporation in the regular course of business as delivered to the United States Steel Corporation Credit Corporation."

I would like to read Plaintiff's Exhibit 42 which is the September 22nd, 1960, memorandum of Mr. Black of the Homes Division to Mr. Rollins of the Credit Corporation;

(Reading)

"Dear Bill:

"Attached is a resubmission of the original request on behalf of Fortner Enterprises, Incorporated, Louisville,

(Vol. VI, p. 106)

Kentucky. I believe the attached memorandum by Mr. Day and the letter by Mr. Fortner clearly explains the situation as of this date.

"Although this was in the category of special financing I have mentioned to Mr. Boyd and where as we are simply requesting a reactivation of an original commitment by the Credit Corporation which had been recommended by Mr. Boyd and others concerned, it is hoped that the Credit Corporation is in a position to make a direct contact.

"Maybe the time element in this program has worked in our favor since we now have commitments in hand covering the thirty-one lots in question and if a financing situation can be consummated this would appear to be our fastest entry into the fall market in Louisville and possibly winter and spring building.

"I realize that you desire to have Dick review this program with you once

(Vol. VI, p. 107)

again and if it is possible we hope this can be accomplished during the week of September 26th. I will be in New Albany on September 28th and 29th, and if I can be of any help I will be happy to meet with you and Dick and Fortner, if necessary. Thanks for your consideration in this matter."

This Exhibit 16 was here, Your Honor, and I just couldn't find it before. So, I will remove the one that I put in and reinstate the one that is already here.

By the Court: All right.

Mr. Anderson: Now, I would like to read Request for Admissions No. 24:

(Reading)

"That Document 226 is a one-page memorandum from Paul Grayson, Sales Representative, Homes Division, to Harry R. Black, General Manager, Sales, Homes Division, dated October 26, 1960, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

(Vol. VI, p. 108)

Now, here is Plaintiff's Exhibit 226, which is the memorandum, handwritten memorandum from Mr. Grayson, dated October 26, 1960:

(Reading)

"Enclosed are signed franchise forms for the subject.

"This has been a long pull as you are well aware, it was back in December of 1959, that Neal and I first contacted these people.

"I believe that this will develop into the best dealer that we have had in the Louisville area. Thanks very much for your help, Paul."

Next, I would like to read Paragraph 26 of the Request for Admissions:

(Reading)

"The Document 178 is a one-page Daily Activity Report prepared by Paul Grayson, Sales Representative, Homes Division, in the regular course of his duties, dated March 2, 1961, and that said document was prepared and maintained by the United States Steel Corporation in the regular course of business."

(Vol. VI, p. 109)

Now, Document 178 is now identified as Plaintiff's Exhibit No. 178 and is dated March 3, 1961.

(Reading)

"Re: Fortner Enterprises, Louisville, Kentucky. Fortner had twenty-three salesmen to attend Sales Training program at this plant."

Now, I will read Paragraph 12 of the Request for Admissions:

(Reading)

"The Document 17 is a two-page memorandum from N. G. Day, of the Homes Division, to Harry R. Black, of Homes Division, dated May 29, 1961; that said document was prepared and maintained by U. S. Steel Corporation in the regular course of business."

And, Document 17, which is Plaintiff's Exhibit 17, reads as follows:

(Reading)

"Date, May 29, 1961. The subject dealer operating in Louisville, Kentucky, is a recently franchised dealer who is presently working with the Credit Corporation under a land development and

(Vol. VI, p. 110)

construction loan agreement.

"Models of the sales program were opened in March and to date the dealer reports over forty-five sales

with several buyers having been approved and others in process. Production houses are now being shipped.

"The dealer recently reacquired an additional group of lots in Golden Meadows Subdivision and has six of our homes sold in this area even though no efforts have been made in that direction.

"Paul Grayson and I met with the dealer on May 19th, to discuss requirements on this group of lots. The lots are located within Golden Meadows Subdivision a short distance from Fortner's existing program.

"They are fully developed F.H.A. approved and ready for use. When the original loan for development and construction was made and closed these lots were not available and

(Vol. VI, p. 111)

were no longer on the development of Fortner Enterprises, Incorporated. They had been sold on a contract to Apex Homes, Incorporated, Herman Miles, President.

"As it was, Mr. Miles intended to build conventional homes on those lots. Since that time Mr. Miles has become General Superintendent of Fortner Enterprises, Incorporated, it's U. S. Steel's home project and did not wish to build homes on his own in competition with Fortner. So, on March 17th of this year the contract expired and the lots reverted to Iroquois Developers.

"It is now Mr. Fortner's desire to obtain full control of the lots in the name of Fortner Enterprises and to build U. S. Steel homes on the balance—taking about a mortgage on the balance—in our meeting with Mr. Fortner he stated that due to serious delays in getting

(Vol. VI, p. 112)

his U. S. Steel Homes program started and further

delays in starting to sell houses because of extremely wet weather all spring and due to the fact that they had gone over their budget for advertising, promotional materials and so forth by a considerable amount he is in somewhat a bind for collateral.

"There were originally thirty-six lots in the subject to group, thirty-four of which were sold to Apex and two to another builder, all of which are now available.

"Four of these being financed for construction of new homes and thirty-two to be picked up.

"Mr. Fortner requests as follows; balance of mortgage on thirty-two lots, $24,000.00, additional capital as required, $30,000.00; total, $54,000.00. F.H.A. valuation of the lots should give us an average, I'm sure of $2,200.00. Mr. Fortner suggests a

(Vol. VI, p. 113)

release value which is the same as the previous agreement and this would pay out on twenty-four lots.

"These lots are ready for use and six sales have been planned, two of which will apply to the requested loan. This program would give us an additional advantage in this market.

"I therefore recommend approval of this request and respectfully urge your usual expeditious handling and further recommendations to the Credit Department."

By the Court: Ladies and gentlemen; remember the admonitions of the Court and be back in your seats at one-thirty.

(Whereupon, at about the hour of 12 noon a recess was taken for lunch, reconvening at about the hour of 1:30 P.M. with appearances as noted heretofore and the following proceedings occurred.)

* * * * * * *

TRANSCRIPT OF PROCEEDINGS
VOLUME VII

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Thursday, June 11, 1970.

(Vol. VII, p. 3)

Reconvened, pursuant to Adjournment, on Thursday, June 11, 1970, at about the hour of 9:30 A.M. and the following proceedings occurred):

By the Court: Good morning, ladies and gentlemen; are we ready to proceed?

(Counsel for the parties indicate in the affirmative.)

By the Court: Call your witness, Mr. Anderson.

Mr. Anderson: Call Mr. Herman Miles.

Mr. HERMAN R. MILES, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination by Mr. Anderson.

Q. Mr. Miles, would you give us your full name, please sir?

A. Herman R. Miles.

Q. And where do you live?

A. 568 Garden Drive, Louisville.

Q. What is your age, sir?

(Vol. VII, p. 4)

A. Pardon?

Q. What is your age?

A. I'm fifty-five.

Q. In 1959 through 1962 with what company or companies were you associated?

A. I was associated with the Cook Lumber Company, Apex Homes and Crestwood Homes, Incorporated.

Testimony of Mr. Herman R. Miles

Q. And what was your position with the Cook Lumber Company?

A. I was President of the Cook Lumber Company.

Q. And what type of business is the Cook Lumber company in?

A. The Cook Lumber Company is in the business of selling lumber and building materials for commercial use, industrial use, and home building, remodeling.

Q. Are you still associated with that company?

A. Yes, I am.

Q. And are you still it's President?

A. Yes, I am.

Q. How long have you been President of the Cook Lumber Company?

A. Since 1949.

Q. As the President of Cook Lumber Company

(Vol. VII, p. 5)

what functions did you serve, uh, and do you serve, and I am particularly thinking in this period of 1959 through 1962?

A. I served in directing the operations of the Company, uh, purchasing of all materials, the pricing of materials and supervision of, uh, taking lists of lumber and furnishing the lumber to these jobs.

Q. All right; now, what business was Apex Homes in, in 1959 and 1960?

A. They were in the business of constructing single-family residences.

Q. And how long had you been associated with Apex Homes?

A. Approximately four years.

Q. And were you an officer of that Company?

A. Yes, I was President of the Company.

Q. Where had Apex Homes built houses prior to 1961?

A. In Golden Meadows Subdivision in Louisville.

Testimony of Mr. Herman R. Miles

Q. And approximately how many houses had Apex Homes built in Golden Meadows?

A. Approximately forty homes.

Q. What kind of homes were these, sir?

(Vol. VII, p. 6)

A. They were small; they were three bedroom homes, brick homes.

Q. And what construction?

A. They were all conventional construction; that is, as you might call building with stick lumber.

Q. Well, what drywall man or organization had you used for the Apex Homes in building these conventional homes?

A. Most of the time, particularly the last few years we had used the Powell Drywall Company.

Q. Well, with particular reference to the building in Golden Meadows by Apex Homes, had the Powell Drywall Company been used?

A. Yes, it had.

Q. Now, who had been the foreman for Apex Homes in building the conventional homes in Golden Meadows prior to 1961?

A. Robert Robinson.

Q. All right; now, you gave us the name of another company with which you were associated in the period of 1959 through 1962, the Crestwood Homes; is that right?

A. That is correct.

Q. What business was Crestwood Homes in

(Vol. VII, p. 7)

during the early part of that period of time?

A. They were in the business of constructing single-family residences.

Q. All right. Mr. Miles, can you tell the jury how many homes you have constructed yourself and by "your-

self" I mean personally or through a corporation with which you were associated?

A. Do you mean from the beginning to the present time?

Q. Yes sir; I would like to start out with that and we can break it down later.

A. I would estimate somewhere between four and six hundred homes.

Q. All right; now, how much building of homes had you done prior to 1961?

A. Approximately eighty to a hundred homes.

Q. And how many homes have you figured materials on or computed the total costs on through your function as President of Cook Lumber Company or your function in relation with any other corporation or company with which you have been associated?

A. I can't exactly say that, but I would say it would be in the thousands.

Q. All right; now, sir, when did you first

(Vol. VII, p. 8)

have any contact with the proposed project in Golden Meadows which would involve the use of the prefabricated packages of the United States Steel Corporation?

A. It was in 1959 that Mr. Earl Smith, a representative of Zettwoch-Fortner Corporation, and who was at that time selling agent for the homes that Apex Homes was building, uh, asked me if our company would be interested in working with Mr. Fortner on constructing a group of homes which was a rather large project and supervising the operation of it.

I told him yes, we were interested; that we would like to look into it further and this we did.

We worked, uh, first with Mr. Fortner and then, at that time a partner of his, and it was dropped for a short

time and then we began again, got back with Mr. Fortner and discussed the project.

We came to an agreement and we decided that we would supervise the homes that he was going to construct in Golden Meadows, some over two hundred homes.

We then, of course, when we notified him, he then made the arrangements with the U. S. Steel Homes. We worked up our prices, which I worked up a list in conjunction with many subcontractors and submitted this list to him, Mr. Fortner.

(Vol. VII, p. 9)

We then, uh, went into operation on it. We got our commitments from the Federal Housing Commission and began construction of the models and this was part of the beginning of the project.

Q. All right; now, let's go back here for a moment; this list of prices that you worked up, on what basis or how did you work that up, sir?

A. Well, we of course started with plans; had various subcontractors that do the different type of operations on building a home take their items off of the plans and specifications.

They submitted to us firm bids. We used U. S. Steel Homes' prices and the additional expenses that we would incur, our supervision fees, various other fees, and came up with a total of the costs of the house.

Q. All right.

A. This list we used for some time until there was some minor cost adjustments which I do not exactly remember what they were, but they total some hundred and fifty dollars and this we later added to the cost for our cost estimate and raised the selling price of the houses by the same amount.

Q. All right; I show you what has been marked or introduced as Plaintiff's Exhibit No. 27 and

(Vol. VII, p. 10)

ask you if you can tell the jury what that is?

A. Yes, that is entitled, "Our Estimated Costs on U. S. Steel Homes by Fortner Enterprises, Incorporated." This was the second price list which we compiled with the changes from our original price or an increase of approximately a hundred and fifty dollars. This covers all of the basic costs on the home itself on all of the models that we were then going to build.

Q. Uh, let's run down those items, Mr. Miles. The first item I believe is engineering, for $40?

A. That is correct.

Q. Was that, uh, on the basis of a firm bid?

A. Yes, it was.

Q. What about the F.H.A. appraisal?

A. Yes, that was a set F.H.A. cost for appraisal at that time.

Q. What about permit and water meter?

A. This is the amount that the Louisville Water Company and the Jefferson County Building Department charged at that time.

Q. What about—now, we are using here the figures to which I am referring, now, are the ones pertaining to the B-1 slab, is that correct?

A. Yes, that is correct.

(Vol. VII, p. 11)

Q. Did your bids, uh, vary according to the model?

A. Yes, each model on some items varied and some items they remained the same. For example, on the F.H.A. appraisal on all models, but on most other items it was different.

Q. Using the B-1 as an example here then, let's go down through the rest of them. Was the concrete work a firm bid?

A. Yes, it was.

Q. What about the ground treatment?

A. It was also a firm bid.

Q. What about the package house?

A. It was also a firm bid.

Q. What about the electrical work?

A. Yes, that was a firm bid.

Q. The heating?

A. Yes.

Q. Plumbing?

A. Yes.

Q. Carpenter, painting and floors?

A. That was also firm.

Q. Now, what about the drywall?

A. It was a firm bid.

(Vol. VII, p. 12)

Q. What about the lumber?

A. Firm bid.

Q. What about the floor covering?

A. Yes, it was.

Q. Ceramic tile?

A. Yes, it was.

Q. Gutters, downspouts and roofing?

A. Yes.

Q. Finished grade, shrubs, trees and sod?

A. Yes.

Q. The Masonry?

A. Yes.

Q. Now, we have got another—that was seed on that other one instead of sod. Now, the sod, was that a firm bid for a hundred dollars?

A. Yes, it was.

Q. Driveway, $50?

A. Yes.

Q. Now, overhead and liability insurance, $40; can you tell us about that item?

A. Yes, it was an item that was paid to the Crestwood Homes, Incorporated, for the coverage of their liability insurance which we carried and also to cover a portion of our individual office overhead.

(Vol. VII, p. 13)

Q. Now, were you individually going to provide the supervision for the building in Golden Meadows or was Crestwood Homes going to do that?

A. Crestwood Homes.

Q. All right. Now, we have got supervision fee and then Herman Miles on here for the B-1 of $300?

A. That's right.

Q. So, that actually should be Crestwood Homes.

A. That—that isn't exactly correct.

Q. All right; tell me about it.

A. A portion of that—most of the portion was directly to Crestwood Homes. A portion of it did come to me personlly for the additional work that I was doing outside of the corporation.

Q. All right. Now, the stamps, deed and release for $25?

A. That—this was as close as possible to being accurate.

Q. Now, what about the accounting fees to Mr. Cooper?

A. This was a set fee as far as I was concerned.

Q. All right. Now, I'm going to skip down

(Vol. VII, p. 14)

here to the real estate commission; was that a set figure?

A. Yes, it was.

Q. Now, where did the discount figure come from?

A. The discount figure used the figure that is used by the lending institution, the amount they charge for giving this loan to you.

Now, this figure was the figure that at the time this was started was the discount. This is an item that could vary up and down depending on the availability of money at the time.

Q. Now, what about interest; did you—were you involved in the computation of that particular figure?

A. I wasn't too much involved in that one. I did know that it was to cover interest and some other closing items of that type, but I didn't know exactly the figures on this.

Q. All right. Now, Mr. Miles, in this cost breakdown, uh, other than the $40 overhead item to which we have already referred there doesn't appear to be any other overhead item; this is correct? Can you tell us anything about that?

(Vol. VII, p. 15)

A. Uh, my basic responsibility was to the houses themselves and there was some additional overhead. At this point it didn't seem there would be a great deal because Crestwood Homes was handling practically a package deal for Fortner Enterprises in with their supervision.

So, there should not be too much overhead. The other—any additional overhead was being handled by Fortner Enterprises, by Mr. Fortner personally.

Q. All right. Now, there is a $2,000 figure, I believe, on Plaintiff's Exhibit No. 27 for the lot. Do you know where that figure came from?

A. Yes, that's a figure given to me by Mr. Fortner to put on the price list and this is all I really knew about the cost of the lot.

Q. Okay. Now, after you had reviewed cost figures with Mr. Fortner, to your knowledge was an arrangement entered into with, uh, the Credit Corporation?

A. Yes, I believe it was.

Q. Were you personally involved in the negotiations concerning the credit aspect of this matter?

A. No, I was not.

Q. Uh, after the—well, did you become

(Vol. VII, p. 16)

aware of the fact that some arrangements had been entered into?

A. Yes, I knew that an arrangement had been made when we were told that—uh, the credit was there and the houses that were there were ready to start.

Q. All right; so what did you do then?

A. Well, we began construction of the models. We constructed six models, uh, and the sales department started selling these houses.

Q. Did you encounter anything unusual insofar the the construction of the models was concerned?

A. Yes, we had many problems on the constructing of the models. To begin with, we would have items that were short on the package that was delivered, uh, items that wouldn't work on the package, uh, and as we progressed along, uh, and were attempting to complete the house, uh, many things just didn't seem to work.

It held us up in time. I personally went to U. S. Steel Homes several times to pick up items that were short. They delivered many items that were short. There were problems that we had with them.

Q. Well now, let's keep ourselves to the models, for right now.

(Vol. VII, p. 17)

A. I'm speaking of the models.

Q. All right.

A. We had these problems with the models.

Q. Okay.

A. We had problems with the windows in the models.

We had problems with the gables, putting the roof together.

I remember on one of the models which had a hip roof and, uh, had precut plywood for the roof pattern, put it together, even with the assistance of some of U. S. Steel Homes technical people we couldn't get it together.

It finally ended up that they furnished full sheets of plywood so that the roof could be put together.

We had problems with the screens not fitting in the grooves. We had problems with the metal closet doors that would not stay on the tracks. I'm speaking as far as the models go.

We had problems with shortages and defects that took us a great deal of time to finish the models.

Q. All right; I take it that you finally did get the models finished?

A. Yes, we did.

(Vol. VII, p. 18)

Q. And how did, to your knowledge, how did sales in the project go immediately after the grand opening?

A. They were excellent.

Q. From your standpoint of your responsibilities what happened then after the grand opening occurred?

A. Well, when the sales began coming in, uh, we obtained additional commitments and started the construction of additional homes.

Q. Did you continue to encounter problems with the house packages?

A. Yes, we did. We continued having the same problems that we were having with the models, plus additional problems.

If I may, I would like to point out some of the problems.

Q. Yes, sir; you can use your notes to refer to.

A. For example, on most of the homes that we built, we certainly had drywall problems.

Q. Will you tell us about those?

A. It began with the models and continued on with the other homes and homes we had previously

(Vol. VII, p. 19)

built and, normally, the way certainly all conventional homes are built is that drywall is furnished and installed horizontally so that if you have a room that possibly is twelve or fourteen foot long, a piece of twelve by four foot drywall is used and applied with gun and nails horizontally in with studs.

Then another piece of the same size, four foot wide, is placed above it and this gives you one horizontal seam.

Now, when light strikes this hoizontal seam it is very difficult to see it after it has been painted.

Q. Is what I have drawn here on the board in the form of—

A (Interrupting) Yes, that's just exactly correct.

Q. All right, sir; what you mean—

A (Interrupting) The U. S. Steel Homes were delivered with the drywall applied and the panels with the drywall applied and it was a four by eight foot vertical panel and these panels in a room were put together vertically and if you had a twelve foot room you had three panels and in a fourteen foot room you had three and a half panels.

Now, this gave you a seam at each one of those

(Vol. VII, p. 20)

panels which were additional seams and when the light would strike a vertical panel of this type it would reflect and you could see this seam.

We had great objections to this, plus it was extremely difficult for the drywall men to finish these seams properly where they couldn't be seen because of the reflection of this light on these seams.

Also this was put on with a plastic screw that we had to the steel stud which we had problems after it was up.

It would, in many cases, would pop out. The panels which were put up, uh, would—now, I'm speaking of the interior panels, were toenailed to the floor and also to the ceiling and then there was a block put in the center.

So, this left the center of the panel where it—one panel was pushed in by just a little force against it, the other one would remain stationary and would either cause a crack, or a movement in a panel so this is where we had a great deal of problem in having the drywall man come back many times to repair this and in some houses three or four times.

Q. All right. Now, as the construction was progressing after the grand opening—let me ask you

(Vol. VII, p. 21)

one question first; before you-all started the construction of these prefabricated houses out there, uh, did you or any of your men have any instruction from U. S. Steel on how to put them up?

A. Yes, we did.

Q. And do you recall who obtained the instructions and about how long they gave it to you?

A. I can't remember who gave us the instruction, but we did go to U. S. Steel Homes plant in New Albany and took a short instruction on installing them.

We had bulletins from U. S. Steel Homes on the models. We had a technical agent or technical personnel of U. S. Steel Homes there to assist us.

This drywall item was one item. We had on the other homes, we have problems with gables and—

Q. (Interrupting) Well, but before—

A. (Interrupting) Right.

Q. Let me ask you a couple of questions before we get

back into those problems. Who was your foreman, I guess you'd say out there for the day to day erection of these prefabricated houses?

A. It was Robert Robinson. He was an officer of the Crestwood Corporation and also the super-

(Vol. VII, p. 22)

visor of the construction.

Q. All right; and who was doing the drywall at Golden Meadows in this U. S. Steel project?

A. Ray Powell Drywall Company.

Q. These were both, I think you've told us are the same people that you were using in the conventional homes before that?

A. This is correct.

Q. Uh, now, if we may get back to the problems with the erection of the houses after the grand opening?

A. Well, in many of the houses we would have problems with the gables. The gables were on studs, on two-foot centers with a five-sixteenth inch panel to cover them and it was plywood which—they called it, which was plywood with a base coating.

We had a great deal of trouble with the ends being wavy. We had attempted many ways to correct it, uh, finally with battens on the outside of it which covered the seams and also gave it additional support.

We tried many ways to correct this and U. S. Steel Homes finally came out with a change in the way to install this which gave it additional support. This covers the gables.

Q. When—do you know when that change

(Vol. VII, p. 23)

came out?

A. I believe it was in July of 1962. I can tell you exactly. Yes, it was on July 22nd of 1962—uh, no, correction there; June 22nd of 1962.

Q. I show you a document and ask if this is an exact copy of the one to which you have just referred?

A. Yes, this is the same.

Q. All right. Well, let's just take the one to which you are referring there and would you tell us what it is and where you got it, please sir?

A. Well, this is an erection and service bulletin sent out by the United States Steel Homes on June 22nd of 1962 and the subject is "Brick Gable Assembly Change."

> "Effective in the very near future a new brick gable nailer assembly will be supplied with all homes containing a brick gable with twenty-four inch eave overhang. The assembly is shown on the attached drawing and is being supplied to assure a straight edge on the brick gable plywood face sheet."

Mr. Anderson: We would like to offer that erection bulletin into evidence.

By the Court: Let it be

(Vol. VII, p. 24)

filed.

Mr. Anderson: That has been identified, Your Honor, as Plaintiff's Exhibit No. 48.

> (Whereupon a document entitled "United States Steel Homes, Erection and Service Bulletin, No. 254", dated June 22, 1962, was marked for identification as Plaintiff's Exhibit No. 48, and received in evidence.)

Q. Up until the time that this erection and service bulletin came out did you continue to have the problems with the gables or did you devise some solution for it or what?

A. We continued to have the problem although not as great, as we did start using battens on the gables which helped in some extent.

Q. Now, I have drawn here on the paper what more or less looks like a gable?

A. Yes, you have.

Q. What—uh, these battens to which you refer, are they vertical or horizontal?

A. They are vertical. They are a strip about an inch and three-eighths wide by slightly over

(Vol. VII, p. 25)

a quarter of an inch thick. This did not give us absolute rigidity, but it did help it considerably.

Q. All right. What other problems did you have, uh, with the erection of these prefabricated houses?

A. Well, one of the major problems is the steel closet doors. In practically every home, in fact I can say in every home including the first home or the models that we built, and we did build one as a model in the home show and we had even in that one, with hundreds of people going by, problems with the doors not staying on the track.

You would open the door and it would jump the track. Well, it couldn't be put back on and this got very aggravating to home owners. We complained to U. S. Steel Homes on this and they sent their technical men over who worked with us on it.

We had no improvement. They had factory men come from—that furnished the steel doors and they would get on it and then later went back to the factory and sent us a different, a heavier type spring to put on it which we installed on them.

This helped a little, but it didn't completely do the job. The job was never done completely. In

(Vol. VII, p. 26)

fact, in June of 1962 U. S. Steel Homes put out another erection service bulletin which covers some of the problems they were having in the door and their improvement on it.

Q. All right sir; do you have that erection and service bulletin report?

A. Yes, I do.

Q. Would you just read that one to the jury, please?

A. This is United States Steel Homes Erection and Service Bulletin of May 9, 1962 on the subject of "Full-View Leigh Steel Folding Doors, Design improvements."

Q. Now, let me interrupt you for just a second there; this "Full-View Leigh Steel Folding Door", was that the same door that was being supplied to Fortner Enterprises?

A. Yes, it was.

Q. All right; go ahead sir.

A. (Reading)

"United States Steel Homes Division is pleased to announce that Air-Control Products Company has introduced design improvements in

(Vol. VII, p. 27)

the Leigh Full-View Steel Folding Door supplied through our Company. The design improvements have been made to give you and your customers a superior operating door and will eliminate track jumping that has been occasioned in the past.

The new improved door is now being shipped when ordered as an option with your Home packages. The design improvements are as follows:

1. Knobs located on inner panels for greater ease of operation.

2. Louver and panel designs on the large panels, three and five foot, have been reduced in width. The appearance is superior and the panel is stronger because less base metal is cut.

3. Heavier gauge braces are now used. To further increase strength of panel, brace stock has been in-

(Vol. VII, p. 28)

creased from twenty-four gauge to twenty gauge.

4. Nylon bearings are used on top and bottom floating guides as well as pivot pins. These special bearings insure freedom of pin movement and substantially reduce noise.

5. Heavier springs are used with guide rods. The heavier spring, combined with the nylon bearing insure guide and tract contact.

6. Nylon guide caps have been redesigned. Radii changed to reduce possibility of cap moving out of track.

7. Heavy machine lock nut with split lock washer now used on bottom pivot end. This combination replaces stamped lock nut and eliminates possibility of pivot movement after proper initial setting.

8. Packing carton has been re-

(Vol. VII, p. 29)

designed to further reduce the possibility of shipping damage."

Q. All right sir. Well, I think it is about as easy—this is a part of the request for admissions, Your Honor; I think it's about as easy to introduce it. We will offer this original in as Plaintiff's Exhibit No. 49.

By the Court: Let it be filed.

(Whereupon a document entitled "United States Steel Homes Erection and Service Bulletion No. 247", dated May 9, 1962, was marked for identification as Plaintiff's Exhibit No. 49 and received in evidence.)

Q. Now, what other problems did you have, sir?

A. Well, after the models were completed we had no problem on them on this particular item, but on many of the other homes we had problems with the kitchen cabinet tops.

The top would, uh, develop a leak and water would then work into the board of the top underneath the plastic and would swell and you would have lumps

(Vol. VII, p. 30)

in the cabinet tops.

Now, this happened in many of the houses. In fact, it happened some of the houses, uh, at least three times and I remember one that it happened four times where we would have to change the complete top.

In the process of changing this top, it took several people to do it. First, the plumber had to disconnect the fittings and the carpenter had to then remove the top and a new top was then put on the plumber had to again install the fittings.

Normally there was some damage from taking this top off to the painting os a wall would have to be painted.

Now, this would happen, as I say, in sometimes three times in a house and on one occasion four times. This certainly held up the operation considerably and many of the home owners were right unhappy with it.

After a length of time, uh, United States Steel Homes redesigned the top and started to furnish a pre-formed top where there was no possible crack because it was a one-piece unit and after that we had no more problems with the cabinet tops.

Q. All right. What—did you have any other problems out there, Mr. Miles?

(Vol. VII, p. 31)

A. Yes, we had problems with the windows in many of them. The window was a single-hung unit which meant one sash raised.

These units were not always square in the panel that was delivered which caused a problem. They would also, if any pressure against the window, the sash would fall out.

I saw this happen several times when someone accidentally leaned up against the window and the sash would come out.

We had, along the same lines, with the window trim that was used on the window, we found, uh, that there was nothing to cover a crack at the bottom of the window where normally a stool is used, a stool and apron.

Q. Now, I will interrupt you there; what is a stool and an apron?

A. All right; at the bottom of the window, I might refer you to these windows here (Indicating) where there is a piece of marble that is on that flat surface. The surface might be considered the stool.

The piece that is running immediately under it is the apron. This gives a finished look to the window and also covers any cracks that might be there—

(Vol. VII, p. 32)

which is always there.

There was nothing furnished for this so we had a discussion with U. S. Steel representatives and they suggested that we make something for this. So, the Cook Lumber Company did make a stool and apron for these windows for which we were reimbursed by the United States Steel Homes.

At a later date, on February 15, 1962, in Erection and Service Bulletin of United States Steel Homes on improvements and design they made this a standard item and they so referred to it in their Bulletin 243 which indicates that the wood window stool and apron to improve the utility of the interior window trim, a wood stool and apron will be included for use with both the steel snap-on window trim and optional wood window trim in all Home packages.

"The wood stool and apron will be sized for each window width. The stool and apron shipped with steel

snap-on trim will be primed white; the stool and apron shipped with wood window trim will be unfinished. To assure a tight fit of the stool and apron to the side jambs, the header

(Vol. VII, p. 33)

and the side jambs should be installed first to insure the proper positioning of the stool and apron. Attached are sketches showing this installation."

So, they did make this then a normal practice.

Mr. Anderson: Well, we will offer that Erection and Service Bulletin into evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon a document entitled "United States Steel Homes Erectional and Service Bulletin No. 243", dated February 15, 1962, was marked for identification as Plaintiff's Exhibit No. 50, and received in evidence.)

Q. All right, sir.

A. We then had some, uh, also some problems with the kitchen cabinets themselves of being out of square and, uh, problems with some of the wall cabinets falling off the walls.

Q. Why was that, sir?

(Vol. VII, p. 34)

A. Well, they—the material that was furnished for installing the kitchen cabinets, uh, was not the proper thing, which caused the cabinets to be installed to the drywall as there were steel studs and one cannot attach them to the steel studs and they had to be attached to the drywall with what is called a "molly anchor" which spreads when it goes through the drywall.

The length of the bolt that was used with this molly anchor was such that it had to be put through the quarter-inch back of the plywood cabinet, kitchen cabinets, plywood back of the kitchen cabinet.

When weight was put into this cabinet it, at times, would come down.

In fact, on June 22nd, 1962 in an Erection and Service Bulletin, the subject being kitchen cabinet installation from the United States Steel Homes, they say:

> "In the immediate future a package of screws will be included in the erection parts box for counter top installation to the Scheirich kitchen cabinets."

(Vol. VII, p. 35)

In the past, we had been in most cases using anchor screws for this purpose. Then, they say,:

> "As soon as possible, Molly anchors with longer screws will be supplied to improve wood kitchen cabinet installation, especially in homes where one or two cabinets may be installed on a steel frame interior partition for an exterior wall. The anchor itself, designed for one-half inch sheet rock, will remain the same, however a longer screw will be incorporated within the anchor to permit fastening to the heavier wood frame on the back of the cabinets rather than through the thin veneer cabinet back only.
>
> To install cabinets in this manner requires—"

and they give items of how to install it.

Mr. Anderson: All right. We will offer this Erection and Service Bulletin as Plaintiff's Exhibit No. 59.

(Vol. VII, p. 36)

(Whereupon a document entitled "United States Steel Homes Erection and Service Bulletin, No. 256", dated June 22, 1962, was marked for identification as Plaintiff's Exhibit No. 59, and received in evidence.)

Q. Mr. Miles, I would like to know a little bit more about this Molly anchor that you mentioned there?

A. Un-huh.

Q. Could you describe it for us of come up and draw it on the board; I guess that would be the best thing.

A. I think I can. (Doing so at this point.) It is just a plug that has sort of a bend like this (Indicating).

By the Court: Is that pen out of ink?

Mr. Anderson: It is getting very low, yes, Your Honor.

By the Court: Then, check and see if there is a new one in the office.

The Witness: It's a plug

(Vol. VII, p. 37)

and a hole is drilled in the cabinet wall and then into the drywall and this Molly anchor plug is inserted into this hole and it has a screw here in the end of it. (Indicating.)

When the screw is tightened this anchor starts to expand, and as you see there, and this expansion then is against the drywall which is here (Indicating) and the tighter this screw is tightened the more this expands and makes contact here (Indicating).

Q. All right. When a kitchen caginet is mounted in that fashion on drywall does that—and after the cabinet is put into use and loaded with dishes and things of that nature does that have any effect on the drywall?

A. Yes, there is a possibility that this anchor could pull through the drywall if there were enough weight in the cabinet.

Q. Did you-all encounter any of those?

A. Yes, we did, particularly before the longer screws were furnished. With the shorter screw it wasn't possible to draw this anchor bolt up where it was tight against the drywall and it would either let loose there or with a quarter-inch cabinet back where the short screw was holding it in, the Molly an-

(Vol. VII, p. 38)

chor in the cabinet back, the screw would pull through the quarter-inch cabinet back.

Q. All right; were there any other problems?

A. Yes, we had problems with the storm door jambs. We did not have this on all houses. We just had it on some of them.

There was a storm door, of course, which was installed on the outside of the door frame. There was a small lock that caught the catch, catch of the storm door there, that was put on with two screws.

When the door was used a bit these screws were much too short and it would not hold this lock steady and cause the jamb to crack.

Well, when this happened that meant replacing the entire jamb and if it were already bricked it caused a good bit of problem to do this although we did have to change, uh, several of them after this happened on several occasions.

United States Steel Homes then started supplying a longer screw for this installation and this problem ceased

Q. All right; any other problems?

A. Yes, we had problems with the screens. It seemed the track on the window for the screens to

(Vol. VII, p. 39)

slide in, uh, this was a half-screen over a single hung portion of the window that raised and, uh, was too tight for the thickness of the screen. We had great problems getting these screens in.

Also, the screens were not of the thickness—were not all uniform so that we would have to juggle screens around to find a slot that would fit a screen or a screen that would fit a slot and then we would have some left over and that wouldn't fit and this caused us to carry them back to U. S. Steel Homes and have changes on this.

Q. Did you more or less—did you make any notes, Mr. Miles, as this project was going on or shortly after this

project was completed to which you can refer about any other problems?

A. Yes, in my notes I have various houses here that the items I have just covered occurred on.

Then, I have other notes of general things that happened on some houses and some of them did not. For example, uh—

Q. (Interrupting) Well, let's just go through those then, sir. You can use your notes, of course to refresh your memory and let's just go through those and see what other problems were encountered.

(Vol. VII, p. 40)

A. Well, we had shortages. I have a note here we had shortages on approximately fifty per cent of the houses.

Q. What was the result as far as the operation and progress of this—of these houses were concerned; what was the result of the shortages?

A. Well, it, uh, naturally held us up considerably. Some of the items, it—that would be short would not stop you. I would either go after them or they would bring them over.

In some cases there would be some items that were major parts of the construction that you would have to stop at that point until you could get a particular item. This we had considerable problems with and did hold us up and cause us to take longer to build these houses.

Q. In your initial meetings with the U. S. Steel people or the training meetings that you have told us about, did they make any statements to you about the length of time for completion of the houses?

A. Yes, uh, we were working on a basis suggested by them and concurred with by us, certainly, that we should be able to complete these houses in thirty days.

(Vol. VII, p. 41)

Q. All right. Now, let's go to the specific, further problems, please sir.

A. Well, we had, uh, this goes along with the shortages of raw materials on many of the houses which caused of course, the same problems, uh, a door that would be the wrong hand door or something similar to this.

Q. Go ahead, Mr. Miles.

A. Uh, other items that we had problems with, we had one particular door, front entrance door that was—had a decorative molding on it and also with this door there were panels under the door or rather under the windows that mached this and in, oh, practically seventy-five per cent of the cases these moldings would fall off after we had them on and we had the house up and we would have to re-glue these.

We had problems with the hip roofs on one of the models. There was a truss furnished by United States Steel Homes and these hip roofs the connections were in such a way that it caused a sag in the roof. In fact, on one of the houses, Lot 367, the truss completely broke. We had one of the U. S. Steel technical people helping us on that particular house when this truss broke.

(Vol. VII, p. 42)

Q. What did you have to do to fix that?

A. Well, it had to be replaced. Certainly, we had to wait for an additional truss.

Q. Do you remember how far along the house was when this truss broke?

A. Well, the truss was being put up. The roof was being put on at the time this happened.

Q. I see. All right sir; go ahead.

A. Uh, small items, many of the inside doors that were delivered to us were not bevelled which caused the door

not to be—not able to close them. We had to bevel these on the job as we did many of the outside doors on the bottom.

We had to bevel these doors or rework them to get them to fit or strike the threshold and, of course, this was a pre-hung door unit which, as with the inside doors, and they should have closed or opened properly.

We had flashing on two of the models, the B-23 model and another model, I think was the B-111 that had a garage and a porch attached to it that had a flashing where the garage or the porch was connected to the building and they furnished the metal flashing for this, but the flashing wasn't large enough so we got leaks

(Vol. VII, p. 43)

from this flashing and we would have to take the roofing off at this point and put in a larger flashing.

By the Court: Gentlemen, we have been going an hour; let's take ten minutes.

(Whereupon at about the hour of 10:30 A.M., a recess was taken to 10:50 A.M. and the following proceedings occurred.)

Q. Mr. Miles, any more problems there?

A. Yes, we had problems, as I mentioned before, on wood cabinets, but to carry it on a little further, on approximately twenty-five sets of cabinets we had crooked rails or screws that were missing, or doors that needed refitting which we would have to refit on the job so that the doors would close in the cabinets.

Q. All right; anything else?

A. Uh, we had a problem with ventilation under the overhang of the soffit on the house where there was a long strip of mesh that covered an opening for ventilation up into the—call it the attic portion although it was actually not a usable attic, but it was a long strip of this wire, the

full length of the house, that showed the lookouts or the two by fours

(Vol. VII, p. 44)

that were extended out to hold the soffit up that you could always see the bottom of these two by fours through there which was not a real nice looking job, plus the wind would come up through there and there was installation in the ceiling it would blow them up at times and would cause some of the windows to cloud up and this sort of thing.

Q. This, just so we will be clear, could you tell us a little bit better what a soffit is?

A. Well, it's the overhang on the front of the house. Your house comes up where the brick is and then there is an overhang out over the front of it. The under part of the house—under part of this overhang is the soffit.

Q. I have tried to draw the outside wall of the house showing a part of the roof there, this area (Indicating), sticking over, does that come over straight like this?

A. Yes, it does.

Q. And is this (Indicating) the soffit?

A. Right.

Q. All right. Now, Mr. Miles in building these houses were you finally able to get them so that they passed the final F.H.A. inspection?

(Vol. VII, p. 45)

A. Yes, we did.

Q. Did complaints concerning the type of complaints that you have told us about arise after the final F.H.A. inspections?

A. Yes, they continuously arose. We had numerous lists of complaints.

In fact, the complaints were so heavy that it kept our people busy on complaints and they were hardly able to build at all. It kept our subcontractors who, for example,

the drywall contractor was unhappy most of the time because he was back doing a job over which he felt was not his responsibility.

The same way with the painter. He was repainting these drywall jobs that were done over after complaints and he felt that this was not his responsibility. So, we didn't have a great deal of harmony for a while because of this.

We certainly brought in United States Steel's technicians, many times on this. We called them and, uh, or would go over and complain about something and they would send someone over and in fact, they almost kept someone there most of the time with the problems we were having

Q. Well, these various problems that you

(Vol. VII, p. 46)

have told us about, was the United States Steel Homes division advised of these problems as they arose?

A. Certainly, many, many times.

Q. All right, Mr. Miles; who ordered the house packages that were used for these houses?

A. I ordered them.

Q. And was there some sort of a form that you filled out that you sent to U. S. Steel?

A. Yes, we used a U. S. Steel order form.

Q. And when you would prepare these order forms what would you put on them as far as delivery of the house was concerned.

A. Well, we began, and on a few of the orders, putting a definite delivery date on when we wanted it delivered and then finally, we put the delivery date on of "Will Notify the Delivery Date", because we were never quite sure of when we were going to be ready for that package

and we did have to release the trailer in a certain length of time.

We couldn't afford to have it sitting there two or three days or four or five days, whatever it might be, so we finally put the—worked out a system of writing a "Will Notify" and then a few days ahead of time when we saw we were going to be at a point where

(Vol. VII, p. 47)

we could use the house, then I would call and give them a definite delivery date.

Q. Why weren't you sure when you would be able to take delivery of the package?

A. Well, we were never quite sure because we never knew how many problems we were going to have in the construction of the home or if we could keep our people on them working from taking care of complaints. We just couldn't stick to a schedule even though we had originally set up one.

Q. Now, sir, were there during the course of building of these houses, problems not attributable to the U. S. Steel Homes package?

A. Yes, there were other problems also. The U. S. Steel Homes were not the only ones.

On any house you build you have normal problems. For example, problems that were not attributable to them, we had some problems with the hardwood floors in the finishing of them. We had problems with the concrete, cracks in them.

We had problems with painting where people weren't a hundred per cent satisfied. We had some problems occasionally in the heating, uh, we would have a problem.

(Vol. VII, p. 48)

The normal problems that you do have when you build homes, and of course, this didn't cause all of the delay

and anxiety that the U. S. Steel Home problems caused because all of this work was let out and on a subcontract basis where the subcontractor was responsible for the complaints.

Therefore, we would call the subcontractor back and without too much objection, naturally, uh, you got some, without too much objection the subcontractor would take care of these complaints because they were his responsibility, but in the case of our problem with the U. S. Steel Home complaints, the subcontractors who erected these or took care of the particular job, such as a drywall, the man felt that this was not his responsibility if there was a defect in the material; that he should actually be paid for correcting this.

Well, we actually talked many of them into doing these things over without charging us and although some we did have to pay to do these things.

Q. I call your attention to Plaintiff's Exhibit No. 49 and 59 which you have previously told us, about the Erection and Service Bulletins. When did those changes by U. S. Steel take place in relation to

(Vol. VII, p. 49)

the virtual shut-down of the subdivision?

A. It was practically the time we shut down; these took place in May and June of 1962.

Q. You mentioned earlier in your testimony that, uh, you had called these various problems to the attention of U. S. Steel. What was their response when you would call their attention to the problems?

A. Well, they would attempt to correct the problem. They would send a man over if he was not already over there.

They would assure us that these things were being straightened out; that the problems would be stopped and

so we figured that this would happen and continued on to a point where we just couldn't any longer.

Q. Well, were there any of the problems that you were just simply never able to resolve?

A. Yes, in some cases we were never able to really completely satisfy some of the homeowners on the drywall application.

We were never completely able to correct the closet doors from coming off the tracks. Most of the other problems after working with them a considerable time, we were able to correct.

(Vol. VII, p. 50)

Q. Now, sir, after this had been going on for some time did you look into any other means of completing this subdivision?

A. Yes, when we—I saw that we were having a problem and I knew that Mr. Fortner knew that we were having major problems, we thought that we might—might be able to pull this thing out, so I suggested to Mr. Fortner that maybe we could build a conventional-type home, that is, built by carpenters, with regular lumber, or possibly get into another prefab.

So, he agreed that this was a possibility and he asked me to work up a cost estimate on these two possibilities, which I did.

Q. All right. Now, first, can you tell us approximately when you worked up these figures?

A. Yes, I believe that was July of 1962—I'll get some papers on this and check myself. It was July—July 23rd of 1962.

Q. Let me ask you this, sir; do you remember attending a meeting at Mr. Hamilton's office with representatives of United States Steel and the Credit Corporation and Mr. Fortner and others being present?

A. Yes, I do.

Q. What was said at this meeting?

(Vol. II, p. 51)

A. Well, the discussion came up—I don't remember all of the details of it, but the discussion came up of the interest that was building up that was causing a loss in the project and the problems that we were having a loss in the project and the problems that we were having and, uh, that we had come up with a plan of possibly building a conventional-type home or another prefab home and when this was suggested, uh, the major thing that left an impression in my mind, Mr. Dyas, who was with the Credit Corporation, stood up at that point and says, "It will be U. S. Steel Homes or else", and turned and walked out the door. This was actually my major impression of it.

Q. Had you prior to that meeting looked into the question of building a conventional or other prefabricated in that project?

A. Yes, I had.

Q. Did that topic come up at that meeting?

A. Yes, I'm sure it did.

* * * * * * *

(Vol. VII, p. 52)

(Whereupon an adjournment was taken to Court's chambers and the following proceedings occurred at about the hour of 11:07 A.M.:)

By the Court: All right.

Mr. Reutlinger: Judge, I think I am anticipating correctly the future course of this testimony and I know if I am not Mr. Anderson will indicate to the contrary, but I assume from material furnished me and from discussions with Mr. Anderson and from the pleadings that Mr. Miles is about to compare both the component parts of other prefabs and their costs and obviously from the last question,

cost of constructing conventional homes on these mortgaged lots.

Now, I am reading to the Court from the prayer—not the prayer at all; I take that back; from the

(Vol. VII, p. 53)

last number paragraph, No. 5, from the Amended Complaint, which is now the basic thrust of the Complaint and that says this:

> "As a direct and consummate result of the contract combination conspiracy in violation of the antitrust laws set forth here and in the original Complaint, the Defendants have caused the Plaintiff, (A) to purchase United States Steel homes at unreasonably high prices".

But it stops there and does not set forth any monetary damages as a result of this alleged violation or alleged situation.

> "(B) To expend additional sums on each house built to date and to repair—

Well, of course we know Mr. Fortner said he spent no such sums and Mr. Miles to the contrary notwithstanding, Bell v. Harmon controls, and he is out on that.

> "(C) To be delayed in the completion of the home planned to be built in the aforesaid development

(Vol. VII, p. 54)

> to the extent that Plaintiff is now unable to go forward with the development."

Well, this is a conclusion, but I don't think that has any bearing on what Mr. Miles is about to testify, and

> "(D) The loss of profits section—"

Which is the first time we come into a monetary damage, and of course this has no bearing on this particular testimony.

> "(E) To be unable to purchase prefabricated homes and their component part from other manufacturers."

Well, there is a restriction, of course, there is no issue there. Of course it is limited to land involved and therefore, of course is—

> "(G) Is the difference between foreclosure of the property and the alleged market value."

Now, there is nothing—if Mr. Miles is going to testify, as I suspect he is, that conventional homes would be cheaper and better, and Empire, or what have you, the other prefabs would be cheaper and better

(Vol. VII, p. 55)

there is nothing in this complaint bearing on that.

The only complaint for monetary damages is the loss of profits which we explore by another avenue and I assume he is competent within certain spheres of that to explore it, but he hasn't done that yet.

So, I don't think he should talk about these things.

Mr. Anderson: If the Court please, I call the Court's attention to the Supreme Court opinion at page 8 where it talks about the market power issue of a tie-in type arrangement and it says:

> "The affidavits put forth by the petitioner clearly entitles it to its day in Court. Under this standard a construction company President stated that competitors of U. S. Steel sold prefabricated houses and built conventional homes for at least $400 less than U. S. Steel's price for comparable models. Since in a freely competitive situation bidders would not ac-

(Vol. VII, p. 56)

> cept the tie-in arrangement obligating them to buy a tried product at a price higher than the going market rate this substantial with respect to the tied product,

prefabricated homes, in its tie may suggest that respondent has some special hypnotic power in the Credit Market. In addition—"

And it goes on about Mr. Fortner's affidavit.

Now, I believe that that clearly makes the testimony which we are about to offer admissible in evidence.

The Court, in ruling, uh, when we tended our second Amended Complaint to include an extra damage allegation on the increased prices, uh, indicated that it would, uh, that a continuance would be granted to the Defendants if we persisted in tendering that second Amended Complaint.

So, we withdrew it in order to proceed with the trial of this action, however I do feel that the increased prices is pertinent to the lost profits aspect of our case, and I—

By the Court: (Interrupting)

(Vol. VII, p. 57)

I don't think it is pertinent to the lost profits aspect at all. If it gets competent at all, it gets competent to—in your effort to establish the per se violation under the Northern case, doesn't it, by virtue of this language on page 8?

Mr. Anderson: Yes sir; I think that that certainly makes it pertinent. I think that it is pertinent on profits, but the Court may not agree with me.

By the Court: I don't think it reaches the profit picture.

Mr. Reutlinger: Don't—can't be possible to reach a profit. If it did why would he want to double up again with his second Amended Complaint? Now, Judge, I will quit with one more observation. Of course, Mr. Anderson is reading from the opinion, and accurately, but it doesn't say anything there about conventional homes, only existing other packages, as I recall it. Of course, I can't argue with the opinion; that's what it says, but it is incredible that that goes to our economic—

Mr. Anderson: (Interrupting) It says prefabricated home and conventional homes.

Mr. Reutlinger: Does it; I'm

(Vol. VII, p. 58)

sorry.

By the Court: Well, I am going to let him show it, but of course, I consider he is showing it not as a measure of damages and I will so instruct the jury.

Mr. Reutlinger: If the Court will admonish the jury—

By the Court: (Interrupting) The only reason—well, the thing that—the place for me to cover it would be in the instructions themselves when I define what the scope of the damage is.

Mr. Reutlinger: That serves the same purpose.

By the Court: My only deason for letting it in here is that it goes to this economic issue, I suppose. At least, that's what I think the Supreme Court says.

Mr. Anderson: I don't have any question about that.

Mr. Reutlinger: All right, sir.

By the Court: All right, gentlemen.

(Whereupon, at about the hour of 11:15 A. M., proceedings

(Vol. VII, p. 59)

were returned to open court before the jury and the following proceedings occurred:)

Q. (By Mr. Anderson Continued) Mr. Miles, I asked you if you would explain to the jury in detail how you prepared your comparison, first of all, of the conventional home with the U. S. Steel package?

A. I took the plan of the same house, the B-1 house that we were building and assembled the information on the necessary items to build this home— a comparable home, the same one that was on the plan with some changes in construction—construction, because it was being done

on a conventional basis, uh, so that we would have the same items as a complete, delivered package of U. S. Steel Homes.

For example, we, uh, took the lumber list that it would take to build this house, the drywall material, because—and the labor for installing the drywall on the walls, because they were already installed on U. S. Steel Home packages, the light fixtures, and this came in the package, the difference in labor of erecting this package over the U. S. Steel Home package as it did take longer to do it, and, more carpenter labor, the

(Vol. VII, p. 60)

insulation for the outside walls and ceiling because this was furnished in the U. S. Steel Homes package, the kitchen cabinets and kitchen range and oven, which is, uh, was in the U. S. Steel Homes package, the screens and storm doors and the locks and necessary hinges that were all in this package, uh, we assembled these prices to see just what it would cost us to bring this house to the same point as this package.

Q. All right; did you include the closet doors in your figures that you prepared?

A. Yes, we, as far as I know, we included all items that were in that package except some of them were, as I stated, an item to do the same job, but in a different way.

For example, we were going to use regular two by four studs rather than the steel studs that were in the package.

Q. Now, Mr. Miles, we have already established that the U. S. Steel package, the exterior and the interior walls came in previously put-together panels.

Just so the jury will understand, how did you—how did you figure on the conventional house, uh, for the wall-type panels?

A. Well, rather than putting up the panels

(Vol. VII, p. 61)

and tying the panels together, the individual plates on the floor were to be layed, individual studs put up and the top plate and then on through the roof and then the drywall was to be installed by the drywall installation man in a horizontal manner as I described earlier in the day.

Q. All right; and what figure for putting the conventional home in the same position as the U. S. Steel package was when it was delivered, more or less, did you arrive at?

A. I arrived at a price of $2,696.48.

Q. Was that delivered?

A. That was all items either delivered and installed to a point where you would have the same as a U. S. Steel Home package on the ground.

Q. All right; and now, what was the amount that Fortner Enterprises was charged for the U. S. Steel package for the B-1 model which you used for comparison?

A. I have an invoice of U. S. Steel Homes Division, of U. S. Steel Corporation, invoice No. 13845, which was on 9-26-61, for a B-1 home on a slab. The price was $3,151.91.

Q. $3,151?

A. $3,151.91.

(Vol. VII, p. 62)

Mr. Reutlinger: What was that invoice number?

The Witness: The invoice number is 13845.

Q. And what is the difference?

A. The difference, $455.43.

Q. Now then, to take the conventional home from the point that it was as the package, what would then be done to complete the erection of a house?

A. Well, it would be the same costs that you would have on the United States Steel home and the conventional

home at that point would have the same costs to complete it.

Q. All right; with the exception of the package costs, would that be the same items that appear on Plaintiff's Exhibit 27?

A. That—that is the cost, if that's the cost sheet; that's correct.

Q. All right; now, how did you go about or did you also prepare some figures on a conventional—on another prefabricated home as compared with a U. S. Steel home?

A. Yes, I did. We asked the Empire Corporation to give us a bid on a prefab—prefabricated

(Vol. VII, p. 63)

home using this plan or one of their plans which was the same size with the same area and the same items and they did submit us one on July 23, 1962. I have a copy of their estimate here.

Q. Now, just a second; had you obtained that bid by personal interview or telephone or some other means before you received the written one?

A. Oh, yes.

Q. All right. Now, would you tell us just in detail how you worked up the figures on the Empire home?

A. The Empire Homes Corporation gave us a breakdown of prices on the basic price of this home delivered to Golden Meadows Subdivision.

They then included items which they do not normally include in their basic package which United States Steel Homes did include, such as the side wall insulation, false gable, aluminum storm door, deluxe trim for the metal doors and the roof shingles.

They did not normally include these items in their packages. They go into detail on how the walls will be built, uh, specification in walls, for example, they say that

they will use two by four wood studs, installed on sixteen inch setters which, as United States

(Vol. VII, p. 64)

Steel Homes had steel studs on twenty-four inch centers.

They state the type of window and the manufacturer of it and who, uh, it was a good window and they tell the type of doors, which certainly were comparable with the ones that U. S. Steel Homes used and how their gable construction would be, their roof would be, the construction, type of trim they used, which were all No. 1 quality trim.

As they said, it would be clear poplar and fir for rake cornice, gutterboard and exterior quarterround.

The interior partition will be factory-built of framed two by four studs, sixteen inches on center, of kiln-dried construction and standard hemlock, thickness of partitions per plan.

They tell the type of doors, and it's bifold doors for the closets, an American Steel door, classic design furnished for field installation complete with hardware and three quarters trim, or trim of special design at option of builder.

They told each item, how they would finish all—everything would be toxic-sealed. The wood materials, all of the doors would be super-satin fast

(Vol. VII, p. 65)

finish and of the trim would be toxic treated and for this they gave a delivery price of $2,708.65.

Mr. Reutlinger: What was that figure again, Mr. Miles?

The Witness: $2,708.75.

Q. All right. Would that package, as delivered, be virtually identical with the U.S. Steel package?

Mr. Reutlinger: Note an objection to the leading question; he is doing very well with the witness without that.

By the Court: I'll sustain that.

Mr. Anderson: I'm sorry.

Q. How would the Empire package compare then on the basis of that bid to the U.S. Steel Homes?

A. In my opinion, I considered it a comparable house, and in some instances, such as the position of the studs, I considered it superior. It certainly would have given us a package that would have been, I believe, satisfactory.

Q. Were there—uh, what does the $2,708.75 figure represent, Mr. Miles?

A. Well, the actual price from Empire Homes

(Vol. VII, p. 66)

on the package as described in their specifications was $1,673.90.

Q. Give me that again.

A. $1,673.90.

Q. All right.

A. Now, to bring that package up to date or up to the point where we would have everything we needed to be comparable with what—with what we received from U.S. Steel Homes we had to add this, uh, as they do on their options on some of these options, the side wall insulation, the roof shingles, the sales tax, the light fixtures, then we added to this the drywall material and the labor on the drywall which was going to be applied horizontally.

Then, an item to hang the walls, the ceiling insulation in, and the range, oven and then the labor to install this trim, the window trim, which they were not furnishing, the screens and wood storm door and cabinets, this brought us up to the $2,708.75 figure.

Q. All right; and what is the difference between the Empire Homes as you have described it and the cost of the U.S. Steel package?

A. There is a difference of $443.26.

Q. I don't remember whether you told us or

(Vol. VII, p. 67)

not; was the Empire bid on a delivered or not delivered—

A. (Interrupting) Yes, it was on a delivered basis.

Q. All right; I hand you what has been marked as Plaintiff's Exhibit No. 23 and ask you if this is a true and accurate copy of the bid received from Empire Homes?

A. Yes, it is.

Mr. Anderson: All right; we offer that in evidence as Plaintiff's Exhibit No. 23, Your Honor.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 23 was received in evidence.)

Mr. Reutlinger: Is that the one dated July 23rd?

Mr. Anderson: Yes sir.

Q. Mr. Miles, based on your experience in the home building industry that you have told us about, do you have an opinion as to the fair and reasonable profit which a developer-builder could have been expected to make under circumstances similar to those at Golden Meadows Subdivision in the period of 1960

(Vol. VII, p. 68)

through 1962?

A. I believe that—

Mr. Reutlinger: (Interrupting) Note an objection if Your Honor please.

By the Court: Overruled.

The Witness: I believe that then and now, that all builders attempt to, uh, realize at least a thousand dollars profit on each house they build.

Of course, it depends a great deal on the, uh, the size and cost of the house. If it's a large house, the profit should be bigger, but normally they do attempt a thousand dollars profit.

Q. On the basis of your knowledge and experience, do Louisville builders, or builders in the Louisville and Jefferson County area normally achieve a profit of the nature you have described?

Mr. Reutlinger: Note an objection, if Your Honor please.

By the Court: Normally do what?

Q. Achieve a profit of the nature he has described.

By the Court: Well, I will

(Vol. VII, p. 69)

overrule the objection.

A. I can't truthfully answer that as far as other builders are concerned.

By the Court: I didn't much believe he could.

Mr. Reutlinger: I didn't know, Judge; I couldn't take a chance.

Q. All right; what has your own experience, Mr. Miles?

A. Well, as I stated, we attempt to make a thousand dollars profit minimum on each house that we build.

Q. Well, the question was have you been successful in doing so?

A. Well, on an overall basis, yes.

Mr. Reutlinger: Note an objection; I don't believe this is pertinent to the issue, what Cook Lumber Company does or Apex, whatever it is.

By the Court: Well, that's—I'm going to overrule it; the jury understands that all he knows about is what he does himself.

Mr. Anderson: All right, sir.

By the Court: Or, what he hopes to do; isn't that it, Mr. Miles?

(Vol. VII, p. 70)

The Witness: That's it; that's it, sir.

Q. Mr. Miles, I'm going to hand you a series of Fortner Enterprise files of particular houses and I'm going to hand you Plaintiff's Exhibit No. 27, which is the cost sheet.

Now, first of all, would you please explain to the jury, uh, if a person in Golden Meadows in this project, uh, bought or signed a contract to have built a basement-type

house just exactly what costs were used for a basement house and you can refer to Plaintiff's Exhibit No. 27.

A. Well, on the second page of the Exhibit it shows the estimated costs for the crawl space. Now, the crawl space house is a house with four joists and hardwood flooring and all of the items necessary for a basement house except the excavation and the concrete walls and a few items of materials such as columns and basement windows.

So, the crawl space price is used as a basis and then added to that is the additional cost of the excavation and concrete job.

Q. All right sir; now, let's refer to a B-1 basement and what I would like to ask you is, uh,

(Vol. VII, p. 71)

if you would, tell us on the lumber for a B-1 basement what the total cost is as it appears on Plaintiff's Exhibit No. 27 for lumber for a B-1 basement?

A. Well, we have an item of, on lumber on the crawl of $507.39.

Q. $507?

A. And thirty-nine.

Q. And thirty-nine cents; all right.

A. To this we must add the addition for the basement of $76.60.

Q. All right; and where does that $76.60 figure—

A (Interrupting) It appears on the third page of the exhibit under "Optional Extras" and under the item marked "Basement".

Q. Check my arithmetic; that appears to be $583.99?

A. Yes.

Q. All right sir.

Mr. Reutlinger: Is this B-1 we are discussing?

Mr. Anderson: Un-huh.

Q. Now, I hand you what has been identified and is

in evidence as Plaintiff's Exhibit No. 110 pertaining to Lot 51, and I'll ask you if you have the

(Vol. VII, p. 72)

file for Lot 51 in front of you?

A. Yes, I do.

Q. All right. Now, I will put that right there so that you can see it easily. Now, I would like for you to turn in that file to the Cook Lumber Company invoices for Lot 51, which has already been established as a B-1 basement house by Mr. Reutlinger.

A. There is one invoice of $546.39; there is an item of $4.12.

Q. Now, should that be included as a part of—referring you to Exhibit 110?

A. No.

Q. Now, that says "Materials for Basement"?

A. No sir; that's not—this is not part of that.

Q. Should the $4.00 item that you—

Mr. Reutlinger: (Interrupting) Note an objection to the leading of the witness.

Mr. Anderson: I am not—

Mr. Reutlinger: (Interrupting) You're asking him if something happened.

Mr. Anderson: I have not finished the question yet.

By the Court: Well, it's a

(Vol. VII, p. 73)

leading question in the form up to that point.

Mr. Reutlinger: That is my objection.

By the Court: You may just ask him what the items are rather than what they represent.

Mr. Anderson: All right. What I'm trying to find out, Your Honor, is which of the invoices he has got in this file should be included as a part of the lumber bills.

By the Court: That's fine. Ask him that.

Mr. Anderson: All right.

The Witness: This item of $4.12 is an item that was on all houses including the basement houses.

Q. All right sir.

A. There is an item of two splashblocks here at $4.00, which were on all houses.

Mr. Reutlinger: If Your Honor please, I don't believe that is responsive to the question; those aren't lumber; as I understand splashblocks, they are under the downspouts.

By the Court: Well, this is

(Vol. VII, p. 74)

cost of basements as he maintains, isn't it?

Mr. Reutlinger: Well, all right; if that's what he maintains, that's fine.

Mr. Anderson: No, if Your Honor please, let me ask it this way.

Q. Mr. Miles, I will refer you back to Plaintiff's Exhibit No. 27 to the lumber item.

A. Un-huh.

Q. When that lumber figure, whatever it is on there, was prepared, was it or was it not designed or intended to include the splashblocks?

A. Yes, it was intended—intended to include them.

Q. All right; so we are putting them in. All right sir; now, are there any other items there that fall within that category?

A. There are two other items of material, however, they were not normally for use with this basement house.

Q. All right; would you check my mathematics to see if I have added those three together?

A. Right.

Q. What is the total?

A. $554.51.

(Vol. VII, p. 75)

Q. How does that compare, sir, to the estimate about which you testified?

A. Well, the estimate was $583.94 and the cost was $554.51, which was some dollars lesser costs.

Q. All right. Now, I would call your attention to a B-144 basement and ask you to look at Plaintiff's Exhibit No. 27 and tell us the total allocated costs for lumber for a B-144 basement?

A. On crawl space portion, $762.55 and from the optional extra for the basement, $76.60.

Q. Check my mathematics; if I'm right, $839.15 total?

A. Correct.

Q. Now, I'll refer you, sir, to the file on Lot 307 which has been established by Mr. Reutlinger as a B-144 basement?

A. Un-huh.

Q. And could you look at the Cook invoices in there and I'll ask you to give the same information as you gave the previous one?

A. There is one invoice of $768.39, an item of $8.00, and that's it; that would refer to this particular—

Q. If my mathematics is correct that's a

(Vol. VII, p. 76)

total of $776.39?

A. Correct.

Q. Is that more or less than the estimate appearing on Plaintiff's Exhibit No. 27?

A. It is considerably less.

Q. All right. I will ask if Defendant's Exhibit No. 111 is a copy of the $780.39 item to which you have just referred?

A. Right.

Q. All right, sir; now, will you please give us the same

information as to the costs appearing on Plaintiff's Exhibit 27 for the lumber on a B-111 house?

A. The lumber, basic lumber for the crawl is $517.39. In the addition for the basement option, that was $76.60.

Q. That comes to $593.99?

A. Correct.

Q. Now, sir, look at the face of those files, the outside cover, Mr. Miles, and find on one of them, the one that has on the front of it a B-111 basement.

(Whereupon the witness did as requested.)

Q. What is the number on that, sir; what is

(Vol. VII, p. 77)

the lot number on that?

A. This is Lot No. 21.

Q. All right. Now, give us the—well, first of all, let me show you what has been identified as Defendant's Exhibit No. 113 and ask you if you can find the original of that invoice in that file?

A. Yes, I have the original.

Q. All right. What is the total amount of that invoice as printed or typed on there?

A. $733.33.

Q. Now, are there any items below the typewritten portion?

A. Yes, there is a credit of $153.33 which made a difference of $580.

Q. All right sir.

A. And there is items totaling $5.10.

Q. Is that all?

A. That is for the items that was needed.

Q. All right sir; $585.10; more or less than the amount of this cost estimate?

A. Slightly less.

Q. Let's just go through all these since they have come up, Mr. Miles; have you got that file?

A. Un-huh.

(Vol. VII, p. 78)

Q. Now, I'll refer you to Defendant's Exhibit No. 112, which pertains to Lot 88 and ask you to tell us—which has been established as B-1 basement, I believe?

A That's correct.

Q. Yes, a B-1 basement. Now, we have previously established that the cost on the cost estimate for a B-1 basement is—total is $583.99.

Now, sir, again, please look at the invoices and give us the pertinent references.

A. There is one invoice for $546.39. There is two invoices together that total $8.00 and there is another invoice of—I don't know what it was used for, but it's here, of $8.57 and another one of $14.42 and then there's an item—there was an extra item for two flower boxes for a different elevation of $14.69 on this.

Q. Are those all of the ones that would be applicable to this lumber list?

A. It's all excepting one item which appears in each one of them of two pieces of material, material for soffit, and this was an item it seems on all of houses that were furnished, however, the soffit material was supposedly furnished by the U. S. Steel Homes and I

(Vol. VII, p. 79)

do not remember the reasoning for these pieces.

Q. All right; can you check my mathematics?

A. I believe that's correct.

Q. All right; now, does that one run over or under the estimate?

A. It is slightly over; yes sir.

Q. By how much?

A. Approximately—approximately five dollars.

Q. Closer to six, isn't it?

A. Un-huh; close to six.

Q. Okay. Now, I'll ask you to look at No. 60, Lot No. 60; what kind of house is that?

A. It's a B-1 basement, just as the last one.

Q. All right.

A. I have an item of $546.39; one for $1.62 and one of $4.00 and again we have the soffit material in this one and we also have another charge of a hood and fan which was an extra item on houses, an optional item which the customer pays for in additional costs on the house, but it is in the lumber bill.

Q. Well, should it be on this list?

A. No, it should not because it is an extra; it's in the lumber bill here, but it is an extra that

(Vol. VII, p. 80)

was charged for in the sale price of the house.

Q. All right; check my mathematics on that.

A. $555.01.

Q. That—is that more or less?

A. Less than the estimated cost.

Q. All right. Now, I believe that Defendant's Exhibit No. 114—is that a duplicate of the—

A. (Interrupting) Yes, it is.

Q. I don't think we need to pursue the rest of these.

By the Court: Well, it is twelve o'clock, ladies and gentlemen; remember the admonitions of the Court and be back in your seats at 1:30.

(Whereupon at about the hour of 12:00 noon a recess was taken for lunch, reconvening at about the hour of 1:30 P.M. with appearances as noted heretofore, and the following proceedings occurred:)

Q. (By Mr. Anderson Continued) Mr. Miles, I call your attention to Plaintiff's Exhibit No. 27 again, please sir. Now, what does that cost estimate show for lumber for a B-1 slab house?

(Vol. VII, p. 81)

A. It shows $27.50.

Q. And what does it show for a B-1 crawl?

A. It shows $507.39.

Q. And what is the reason for the large differences between those two, sir?

A. Well, on the slab you have a concrete slab floor and as the package is delivered from the United States Steel Homes most of the items that are needed to build this, there is very little lumber needed and these are very incidental things for attachment and this sort of thing where, on the crawl space house this includes a floor—a system of floor joists and beams and hardwood flooring.

Q. Now, did U. S. Steel furnish the floor joists on a crawl or basement house?

A. No, they didn't furnish anything below the plates of the house, which is the bottom member that is attached above the floor.

Q. All right sir; and which was used when figuring a basement, slab or the crawl?

A. The crawl figure was used to figure the basement with a figuring of the additional items of lumber or building material needed for the basement.

Q. All right; let us quickly go through the

(Vol. VII, p. 82)

rest of these; there are just four more here. What is the first one and what is the lumber?

A. The first one is a B-1 basement; it's Lot No. 190.

Q. And the estimate would be, totalled $583.99 again. Would you look at your bills that you had before?

A. There is one bill for $546.39.

Q. Okay.

A. And one for $4.00.

Q. Okay.

A. And again we have the soffit material.

Q. All right; that would be $550.79; is that more or less than the estimate?

A. That is considerably less than the estimate.

Q. Now, this Defendant's Exhibit No. 115, is this a copy of the one bill that you've just identified?

A. Yes, it is.

Q. Now, what is the next lot that you have there, sir?

A. We have a B-1 basement on Lot 185.

Q. Another B-1 basement?

(Vol. VII, p. 83)

A. Yes.

Q. All right.

A. I have one invoice for $546.39, one for $10.08, one for $5.33 and one for $4.12, plus the invoice for the soffit material.

Q. That comes to, if I am right, $575.92; is that more or less than the estimate?

A. It is less than the estimate.

Q. All right. I show you Defendant's Exhibit No. 17 and ask you if this is a copy of that largest invoice in there?

A. Yes, it is.

Q. All right; now, what is the next lot you have here?

A. The next is a B-1 basement, Lot 84.

Q. Lot 84; all right. What about your invoices?

A. We have one invoice for $583.99.

Q. All right.

A. Then I have an invoice which is an extra of hood and sand which was charged to the Lot and also paid for by the customer.

Q. All right; these are the same, is that correct?

(Vol. VII, p. 84)

A. That's correct.

Q. All right. Now, I show you this invoice which is marked Defendant's Exhibit No. 118 and ask you if that is the same as the invoice to which you have just referred?

A. Yes, yes it is.

Q. Now, what is the next file there, sir?

A. A B-1 basement, Lot No. 196.

Q. Okay; what are your invoices on that?

A. I have an invoice for $583.99 and I have one invoice for $5.89.

Q. $5.89?

A. Eighty-nine cents.

Q. That comes to $589.88 and that's about six dollars over again, isn't is?

A. That is correct.

Q. All right; and here is this copy of the invoice to which you have just referred?

Q. This is Defendant's Exhibit No. 119.

A. (Witness nodded head affirmatively.)

Q. Mr. Miles, after the Golden Meadows project was closed down in 1962, uh, did you remain in the building business?

A. Yes, I did.

(Vol. VII, p. 85)

Q. What happened to Mr. Robert Robinson after Golden Meadows was closed down?

A. He stayed together with me in the Crestwood Homes Incorporated and in the homes we built he operated as Superintendent.

Q. All right; was his work satisfactory or unsatisfactory during the Golden Meadows project, and afterward?

A. I considered it satisfactory as we built homes together up until the last of—early part of 1969.

Q. I show you what has been marked as Defendant's Exhibit No. 123, which is entitled, "Sequence of Events Following Sales of Homes in Golden Meadows Subdivision", which has already been established that I prepared or type up and ask you if you furnished any of the information on that document, sir?

A. Yes, I did. I furnished the date of the order of the home package and the date of the delivery of the package, the date construction commenced and the date construction was completed.

Q. All right; and where did you get the information that you furnished?

A. Well, I got the date that the home package

(Vol. VII, p. 86)

was ordered from the order blank which I prepared and then the date of the delivery of the package from, uh, the invoice and the date construction was commenced by the records that we kept in the subdivision on the actual starting dates and the date of the completion was either the date that we considered that the house was completed or we had the final F.H.A. inspection.

Mr. Anderson: All right sir; that's all we have at this time, Your Honor.

• • • • • • • •

(Vol. VII, p. 114)

Q. Did you, when you talked about the preparation of the conventional homes, itemize on your direct examination what you would supplement or you would furnish? Do you remember you discussed with Mr. Anderson costs of—

(Vol. VII, p. 115)

Mr. Anderson: I think he did itemize it, but I didn't write it down, Mr. Reutlinger.

Mr. Reutlinger: He did itemize it and they weren't written down.

The Witness: Hunh-uh.

Q. This conventional home figure, you've got some notes there?

A. Yes, I have.

Q. When were those notes prepared?

A. Uh, actually I cannot state exactly when it was prepared. I have—

Q. (Interrupting) Well, when were they prepared approximately?

A. Oh, they were approximately prepared in, uh, May, June or somewhere in there, 1962.

Q. All right. Now, what were the items that make up this one conventional package of $2,696.48?

A. Items by price, is that how you would like it?

Q. Well, why don't we just read them out again. You went over them so fast I didn't catch them, the item and price.

A. All right; the lumber list was $622.

(Vol. VII, p. 116)

Q. Now, what is the lumber list; I'm not trying to go into each two by four. I know that's going to be wrong; what was that figure?

A. $622.00.

Q. Would there be roughly enough lumber to match the basic home package?

A. Yes, I'd say so.

Q. I mean, I'm not trying to—but, roughly?

A. It may vary a little, yes.

Q. Well, yes, but of course you and I are both at a disadvantage here because you are trying to compare, in effect, apples and oranges, aren't you? I'm really not worried about the price yet. We will get to that in a minute, but

the prefabricated had different materials and your conventional house had other, but different material?

A. That's right; all the things that I read to compare was maybe two different types of items that would end up with the same net results.

Q. Same. Well, I know you would end up—if you carry that a little further, you would end up either furnishing an apple in place of an orange to satisfy the hunger and you would make a price comparison

(Vol. VII, p. 117)

between the two.

A. No, I don't believe this is good.

Q. That's not good; all right. Well, anyway, you had $1,622 in lumber; all right.

A. I had drywall material and labor, $259.

Q. This is drywall complete, isn't it?

A. That's right; and the labor for hanging that and finishing.

Q. Okay.

A. Then I have $41 for installing the inside walls.

Q. Now, you will have to help me; what do you mean by "installing"?

A. Just mark it hanging the walls.

Q. Un-huh; okay.

A. Then, I have $160 which is the difference in mainly the carpenter work between erecting a prefab home and a conventionally built home?

Q. How many hours is that?

A. I wouldn't have the faintest idea.

Q. How do you get to $160 if you don't measure it in hours?

A. Because I got an estimate from the carpenter at the time, what he would charge additional to

(Vol. VII, p. 118)

do it.

Q. Who was that?

A. It was Bolin and Robinson.

Q. Mr. Robinson?

A. Mr. Robinson.

Q. Okay.

A. You had $150 for insulation for the outside walls and ceilings which had been furnished in the U.S. Steel Homes package.

Q. Okay.

A. I had $153.98 for the Mark 27 oven and range which is the identical range that was furnished.

Q. Okay.

A. I had $225 for kitchen cabinets and other cabinets, including the vanity.

Q. Ktichen and other cabinets; all right.

A. Yes, I had $60.50 for the screens and storm doors.

Q. Okay.

A. That's the total of $2,696.

Q. I will take your arithmetic because this is—that's why I went into law school; I can't add and subtract. You put it on a tape, didn't you?

(Vol. VII, p. 119)

A. It's on a tape.

Q. All right. Where is your sales tax there?

A. Sales tax is included in each one of the individual items.

Q. Separate items—I see; and is this the shipping charge out there?

A. There is no shipping charge; this includes delivery to the job.

Q. I mean, this is a blanket charge?

A. This is it.

Q. This is it; delivery, tax paid?

A. Right.

Q. All right; you still won't give me the idea that you are ending up with the same results at a price as you indicate, but you are putting a conventional house in place of a prefab house and that's not different, like apples and oranges?

A. It's different, but it's still a house.

Q. Sir?

A. And it's still the same room arrangement.

Q. I understand.

A. It's the same materials as far as the appearance, the same, but it's constructed in a dif-

(Vol. VII, p. 120)

ferent manner.

Q. It's different, yes. All right. Now let's look at the Empire home. I have run out of paper here. This Empire home is based on, as you point out, a bid by Empire homes sometime in June?

A. Right.

Q. Supplemented because—

A. (Interrupting) Or July.

Q. July 23rd, supplemented because that bid did not have everything in it?

A. That's true.

Q. Look at the Empire Homes' statement and it indicates that the price Empire Homes quoted did have the Kentucky sales tax; is that correct?

A. Let me look; I don't remember.

Q. Yes, look, yes; I'm not trying to test your memory.

A. It does not include Kentucky sales tax; that's true.

Q. So, that sales tax is three per cent?

A. No, this isn't true on this figure I'm giving.

Q. I'm speaking of Empire Homes' basic price.

A. But I—but I have added in this total

(Vol. VII, p. 121)

that you have there as $2,708.65, there is an item in there on sales tax on above of $54.17; this is in the addition.

Q. I see; all right; we'll scratch that off then. What items did you supplement this with besides the $54 and some-odd cents?

A. Well, I think first we need to back up to the bid of Empire Homes which their basic bid was $1,672.90.

Q. That's correct.

A. Then, they added that to the sidewall insulation of $43.65.

Q. Right.

A. False gable of $60; aluminum storm door of $19.85, deluxe trim for metal doors, $10.50, roof shingles, $87.95.

Q. That's correct.

A. And then I added to that, to supplement it.

Q. Well, this is still—all of what you have just read is Empire Homes then?

A. That's right.

Q. And it is a—it has been introduced as an exhibit, hasn't it?

(Vol. VII, p. 122)

A. That's right.

Q. Then you added—

A. (Interrupting) I added the sales tax on the above of $54.17, light fixtures which they did not include in this package of $25.

Q. Yes.

A. Drywall material and labor, $259.

Q. Drywall complete, isn't it?

A. That's right; complete, $259, and the item to hang the wall, $41.

Q. Okay.

A. Ceiling insulation of $45.

Q. Okay.

A. Mark 27 range and oven, $153.98.

Q. That's the same figure over there.

A. Same figure.

Q. Your same range and oven; okay.

A. I have trim, labor to install window trim, $40.

Q. Okay.

A. I have the screens and storm doors, $60.50.

Q. Okay.

A. And cabinets, $225.

Q. And this adds up to this figure. (Indi-

(Vol. VII, p. 123)

cating)

A. That's right. $2,708.75.

Q. Did you or did Mr. Fortner obtain a second bid from Empire Homes in October of 1962?

A. Yes, I believe that Mr. Fortner obtained that bid.

Q. And you've got it in your hands there now?

A. Yes, I have.

Q. Now, keep these differences in mind and I will read from it before we asked that it be introduced in evidence and ask you if it first doesn't say, after being addressed to Mr. Fortner, that,"

"We are pleased to quote you the following price on Beacon Elevation N.":

that is what it says there?

A. That is true.

Q. And Beacon Elevation N is the Beacon B-1 slab of U.S. Steel Homes?

A. Correct.

Q. And it's not wrong, I don't mean to imply that it is wrong, but either you or Mr. Fortner or somebody took U.S. Steel Homes' plan of the Beacon B-1

(Vol. VII, p. 124)

slab which was the basic product at this subdivision and

took it around to Mr. Empire and said, "What can you do; what can you do for us like this", didn't you?

A. This I do not remember because I did not get this bid.

Q. Well, you have it in your hands now.

A. Oh, yes.

Q. And it does say Beacon B-1 slab, doesn't it?

A. Yes.

Q. Have you ever seen it—well, you have seen it because it's your Exhibit No. 32 and this is a Beacon?

A. Yes, I have seen it.

Q. The Beacon B-1 slab and the third page of this—yes, the third page of it gives a basic package, U.S. Steel Homes before the addition, of $2,769, doesn't it?

A. That is true.

Q. And this Beacon is the same as this Beacon?

A. No sir; it is not.

Q. It is not. Well, what is the distinction?

A. This Beacon(Indicating) there is in-

(Vol. VII, p. 125)

cluded the option that U.S. Steel Homes has of the steel doors.

Q. No, I didn't mean—I'm not comparing them yet, oh no; the Beacon—I'm sorry; you misunderstood my question. I am not trying to compare the differences yet; I'll get to that, but the Beacon in this Plaintiff's Exhibit 32 is the same Beacon B-1 plan that Mr. Empire Housing is referring to.

A. As far as I know it is. I do not know.

Q. I presume so, don't you?

A. I imagine that it is, but I cannot be positive.

Q. All right. Now, basic package price quoted in the Empire Homes letter is $2,614.52, right?

A. Right.

Q. And I'm not going to fool with the fifty-two cents.

I'm going to date it so we know what we're talking about, which is October, 1962. Do you know or did Mr. Fortner tell you why he sought and obtained this second bid in October?

A. If he did, I do not remember.

Q. All right; there is a difference in the basic components furnished between U.S. Steel Homes and the Empire bid.

(Vol. VII, p. 126)

For example, for it you will look at Paragraph 4 of the Empire bid you will find on the second page, and you will see that the roof structure which they propose to furnish, factory built, clear span roof trusses, so forth, are to be constructed of yellow pine. You find that there, don't you?

A. Yes, I do.

Q. I believe the Home packages you were receiving, the roof trusses were constructed of either Western fir or Hemlock?

A. Yes.

Q. Is the Western fir or Hemlock a more expensive or a more comparable wood?

A. Not with the balance of the specifications on the two by fours, yellow pine, where it says 1,500 P.S.I., which gives the strength of the yellow pine and I don't remember what the market was then, but today with these specifications in the pine and fir, very little difference with the pine being much the stronger.

Q. Well, I didn't ask you about today. You can't tell us about the market then, can you?

A. Yeah, I don't know how the market was then.

Q. And it is your view that the yellow pine

(Vol. VII, p. 127)

was certainly as desirable as the Western hemlock?

A. Certainly.

Q. All right. I direct your attention to the No. 8 and

subparagraph where the Empire Homes proposes to furnish ceiling drywalls and tape for ceiling and walls and is this their complete quotation; is this all they were supposed to furnish?

A. I can't answer that; I don't know.

Q. Well, if you had received this letter from Empire Homes what would you expect to be furnished for the drywall which is mentioned only in Paragraph 8?

A. In that particular item it says ceilings and drywall and tape for ceilings and walls.

Q. You wouldn't expect anything else, would you?

A. That's right.

Q. How about your spackle compound?

A. I believe I saw this someplace else in this paragraph; let me look. I really haven't studied this so I don't know it too well.

Q. Well, you have had it a lot longer than I, Mr. Miles.

A. Yes, I think today is the first time that I had this, that I remember.

(Vol. VII, p. 128)

Q. I see. All right; well, take your time and read it.

A. I don't see anything on it. The only thing I see is an item, Item 6 is that this sheet rock is applied to both sides of a partition, but not taped or finished.

Q. Well, that has nothing to do with the furnishing of spackling compound, does it?

A. No, it doesn't.

Q. You would require spackling compound to complete the drywall installation, of course, wouldn't you?

A. Yes sir.

Q. And you would, I think, if I am informed correctly, and I am on dangerous ground here because I am not a builder, but you have two kinds of spackling compounds; you have the base and then the finish coat?

A. That's correct.

Q. How much would you require in a house of this size?

A. I'm afraid I couldn't answer that exactly.

Q. Well, would a hundred and fifty pounds of each type sound about right?

A. I would think that would be certainly

(Vol. VII, p. 129)

ample.

Q. All right; at this time what was the price per pound or how much would one hundred fifty pounds cost; maybe that's—

A. (Interrupting) Let me think of this just for a minute; I actually don't know the exact price then. I do know it now.

Q. Well, just round numbers.

A. Round figures, I believe it's forty pounds—the retail price on it is about $4.00, or in round figures.

Q. For forty pounds?

A. For around forty pounds.

Q. And it would take about three hundred pounds?

A. I don't believe it would take that much.

Q. One hundred fifty of each type?

A. I don't believe it would take that much of the finish coat; it would of the first coat.

Q. All right.

A. I'm not an expert; I can't tell you.

Q. All right. Well, let's just put spackling compound, extra. In the Empire Homes we find that they propose to furnish wood closets, and shelf supports and

(Vol. VII, p. 130)

and wood closet poles which are items 8(A) and (B), and I believe the Steel package uses the metal for those items?

A. Right; that's true.

Q. Do you know the difference in the cost?

A. No, I don't.

Q. Would the metal cost more?

A. It probably would cost a little more.

Q. All right.

A. I think we are talking about pennies though.

Q. Well now, we are getting awful close here so maybe if I talk enough pennies I can get you down; that's what I'm trying to do, Mr. Miles, but that's no secret to you.

A. Right.

Q. And No. 8 (C), (D) and (F), and let's stop there for a minute, are screened aluminum ventilators for the soffits; aluminum-bound window screens and lantern-type fixture for the front.

A. Un-huh.

Q. Can you tell from those quotations, either the quality, the manufacturer, or the price of those items?

(Vol. VII, p. 131)

A. No more than I could from the U. S. Steel.

Q. Are you familiar—you are, of course, with the U. S. Steel package, aren't you?

A. Right.

Q. So, it is certainly possible that this or these items I have discussed could be different quality than furnished by U. S. Steel, either greater or lesser?

A. I would doubt that on any of these items, for example, the aluminum-bound window screens, which I am not absolutely positive, but I seem to—well, this was one of the problems with the window screens. Here was—

Q. (Interrupting) You have given us—

Mr. Anderson: (Interrupting) May it please the Court; can he give an answer?

Mr. Reutlinger: I would like a responsive answer.

By the Court: All right; answer the question, Mr. Miles.

A. I—one of the problems certainly was with the screens.

Q. Mr. Miles, would you let the reporter read back the question; I didn't ask you about problems

(Vol. VII, p. 132)

with the screens.

A. All right.

Q. I asked you about the type or cost of screens and I asked you if, from this paper, this Empire Homes estimate you can tell the cost or quality of the screens quoted by Empire Homes?

A. No, I can't tell the cost of the—or the quality of it.

Q. All right; and the same, I assume is true of the lantern-type fixture for the front?

A. That's true, but I am sure that it was comparable with what was furnished by—

Q. (Interrupting) Well now, what makes you so sure; did Mr. Empire show you what they proposed to furnish?

A. No, they did not.

Q. Did they tell you who manufactured it?

A. No.

Q. Did they tell you the cost of it?

A. No, they did not.

Q. Did you ever consult with them about it?

A. No. My only comparison there is in all of the lantern-type fixtures for the front—on the front, I just don't believe that any of them would have

(Vol. VII, p. 133)

been of a lesser quality than the ones that were used on the U. S. Steel homes; this is why I say I am sure that it would be about the same.

Q. But is this the basis for your belief only; that you don't—

A. This particular item, yes.

Q. (Continuing)—only that they wouldn't do it?

A. That's right.

Q. All right. Now, the same questions would be addressed as to items (H), (I) and (J) which are the chrome bath fixtures, the kitchen cabinets and trim and the wooden shutters?

A. Un-huh.

Q. You would have to make the same answer, wouldn't you?

A. I believe so; certainly wood shutters are a standard thing in everything.

Q. Well, they are standard, but certainly if someone makes them better or more expensively than someone else—

A. (Interrupting) Very little difference.

Q. But some difference?

A. Possible.

(Vol. VII, p. 134)

Q. And it's possible that it could be either way, Mr. Miles?

A. That's right; it's possible.

Q. I am not trying to say it is all one way, but there could be a difference?

A. Could be.

Q. All right. Where is Empire Homes today?

A. They are out of business.

Q. You mean they went bankrupt, didn't they?

A. That's true; about two years ago.

Q. Were you aware that the Steel Corporation of the Steel people offered and paid for advertising to promote Golden Meadows Subdivision?

A. No, I did not; that was not my department.

Q. Well, I mean you may or may not have been aware of that. I understand; that's why I asked the question.

A. I'm not aware of it.

Q. If, in fact, this is so, do you find anywhere in the

Empire Homes proposal where they offered such advertising costs to be defrayed; doy uo see it in this paper?

A. No.

Q. Did Empire offer any engineering service,

(Vol. VII, p. 135)

if you know?

A. Yes, they helped us a good bit with engineering—that is, I'm speaking of plans, that sort of thing.

Q. How about field engineering?

A. No field engineering.

Mr. Reutlinger: I would like to offer in evidence the paper that Mr. Miles has been reading from, which is a letter from Empire Homes Corporation dated October 18, 1962, addressed to Mr. Fortner. I do not have an extra copy and with the Court's permission I would ask the Reporter to make a copy, if Mr. Anderson would like to keep the original.

Mr. Anderson: You can use the one I gave Mr. Miles a while ago; you can use that one.

By the Court: All right; let it be filed.

(Whereupon a letter from Empire Homes Corporation, dated October 18, 1962, to Mr. A. B. Fortner, Jr., was marked for identification as Defendant's Exhibit No. 124 and received in evidence.)

(Vol. VII, p. 136)

Mr. Reutlinger: At this time I would move the Court for admission into evidence an exhibit tendered by the Plaintiff, No. 32, and if I must, I will take it as my—I want it as my exhibit, but I think for simplicity of the record it could still be identified as Plaintiff's Exhibit No. 32.

By the Court: Any objection to that?

Mr. Anderson: Yes, Your Honor.

(Counsel confer at counsel table at this point.)

Mr. Reutlinger: Well then, let it be offered as my exhibit, whatever I have.

Mr. Anderson: Well, just record our objection to it's offer; I don't think it has been established that it has any competency or pertinency. Mr. Miles has testified that it was not—

By the Court: I'm assuming you are going to.

Mr. Reutlinger: He has testified from that this morning and he said this Beacon refers to—it refers to this Beacon and then he says they are not comparable and we have gone over the dif-

(Vol. VII, p. 137)

ferences.

By the Court: Yes. Well, let it be filed.

Mr. Anderson: You've not gone over the difference.

Mr. Reutlinger: Now, Mr. Anderson, we are going to be arguing the case at a later time I'm sure.

Mr. Anderson: You have stated the basis for your argument and I am stating the basis for my objection; Your Honor, I'm sorry.

By the Court: All right; the argument is all over; both of you.

(Whereupon a document entitled "cost estimate, Beacon Plan B-1" was marked for identification as Defendant's Exhibit No. 125 and received in evidence.)

• • • • • • • •

Q. If, Mr. Miles, the Fortner Enterprises had gone to conventional homes would you have expected to sell them all of the lumber for that?

A. Yes sir.

Q. That is the Cook Lumber Company's business, isn't it?

(Vol. VII, p. 138)

A. It certainly is, however, I would not have stopped him from getting bids.

Q. I understand that. Well, you would hope to get the contract?

A. That's right.

Q. Which would have been, uh, this figure, whatever it was, some $1,600 referred to earlier?

A. Right.

Q. Did Crestwood Homes furnish all of the shrubbery for this project?

A. I don't believe they did, all of them; they did some of the, this is true; I'm not sure that it was all of them.

Q. Well, wherever I can dig up a little piece of paper with shrubbery for $32 on a Crestwood Homes, that would be your lot, wouldn't it?

A. That is correct.

Q. Exhibit No. 27, Mr. Miles, I hate to jump around, but I have to, Mr. Miles.

A. Here it is.

Q. You have it before you?

A. Yes.

Q. It has lumber as a general proposition for each of the model homes and I think you told us on

(Vol. VII, p. 139)

direct examination that you'all, Cook Lumber Company, charged for, among other items, splashblocks, which are concrete block to take the down flow from the water?

A. Right.

Q. And obviously, they are not made out of lumber?

A. That's true.

Q. When you made this projection, Plaintiff's Evhibit No. 27, was it your purpose or intention to cover everything under the item, "Lumber" that the Cook Lumber Company proposed to furnish?

A. Each item, yes, that we normally—

Q. (Interrupting) Normally, Yes.

A. Yes.

Q. Yes, I understand that. Now, you have already told us that the hood and fan was an extra item?

A. Yes.

Q. And was charged extra for the ultimate buyer?

A. Right.

Q. Were there any other extra items you can recall in his, or put it another way, the hood and fan

(Vol. VII, p. 140)

would not be in this lumber projection, would it?

A. No, it would not.

Q. Anything else that would not be?

A. I honestly cannot remember that long ago.

Q. All right. Well, except for extras, however, such the hood and fan, it was the purpose of this projection where you say, "Lumber", to account for or to assume the costs of items that the Cook Lumber Company would furnish?

A. This is true.

Q. Whether they were actually wooden or not?

A. Yes, that—

Q. (Interrupting) Using the splashblock as an example?

A. Yes, windows and many other items, nails.

Q. Yes, I understand.

A. And hardware.

Q. All of this would be Cook Lumber Company.

A. Right.

Q. Okay; did you ever discuss this subdivision with either Mr. Gardner or Mr. King or Ernst and Ernst when they made an audit?

A. No.

(Vol. VII, p. 141)

Q. Not an audit, when they came out to do some accounting work, sent by the Steel people?

A. No.

Q. Along about June of 1962?

A. If I did, I don't remember ever hearing of them.

Q. Well, do you recall the accountants coming around to Cook Lumber Company and talking to you about this project?

A. I sure don't; it may have happened, but I don't remember it if it did.

Q. All right; that's perfectly all right. I'm just trying to lay a little ground work. Now, you, shortly before we quit, when you made your comparison here, you gave us a figure of $3,150.91?

A. (Witness nodded head affirmatively.)

Q. I don't believe you told us the Lot number involved and I suggest that it was Lot No. 215; would you get that paper you were reading from?

A. That is correct; it was on the invoice.

Q. That was from No. 215?

A. Yeah.

Q. Now, you say—you may assume because it is already in the record without dispute that this

(Vol. VII, p. 142)

was a B-1 package?

A. Yes.

Q. However, I think it is true that the invoice does not account for any extras on the face of the invoice, does it?

A. No, it does not.

Q. So that the invoice simply shows the price charged for that package?

A. (Witness nodded head affirmatively.)

Q. Which was a B-1 package and which could or could not have extras which we know were available?

A. That's right.

Q. So that the figure of $3,151.91 used here is simply an invoice figure if, in fact, there were extras in that

charge—you don't know at this time or at the time you testified this morning?

A. This is true, except this is about a normal figure on all of the B-1's.

Q. I see. All right; well then, why don't you look at Document 478, which is Lot No. 210, and the document is numbered and as Plaintiff's tendered Exhibit number and if that doesn't show, Counsel can follow me; look at Page 416 (A) and I'll give you the page number.

(Vol. VII, p. 143)

Mr. Anderson: What is the lot number?

Mr. Reutlinger: Two hundred ten.

Q. Mr. Miles, we are going through some records here and it is manifestly unfair to ask you these questions without having the records also, but it is going to be simpler if your lawyer keeps track of it and, if I am wrong—

Mr. Anderson: (Interrupting) Well, now, I'm not going to agree to that procedure as to—

Mr. Reutlinger: (Interrupting) Well, we'll go over it one by one.

By the Court: All right, gentlemen; let's talk one at a time; go through it item by item.

Mr. Reutlinger: I'm referring to your Documents, 589, 414, 384, 480, 401, 630, 623, 411, 412, 609, and I will give them to you in a minute; don't worry; your Document, 586, 579, 504, 497.

Mr. Anderson: We are starting with—

Mr. Reutlinger: (Interrupting)

(Vol. VII, p. 144)

Have you got it Scotty, $497?

Q. I suggest, Mr. Miles, that Plaintiff's tendered Exhibit 478 is for Lot No. 210; the invoice price, including sales tax and prepaid freight for a B-1 house, is $3,102.80; this doesn't shock you, does it?

A. No.

Q. I suggest that Plaintiff's tendered Exhibit No. 589—436, on Lot 389, which is a B-1 house, has an invoice price including tax and freight of $3,068.13; does that shock you?

A. Not without knowing what was in it; I agree.

Q. All right. Well, we know that the invoice could have extras in it even at those prices which would make it higher, wouldn't it?

A. Yes, and it could have deletions.

Q. What would you delete from a basic B-1 package?

A. At the moment, I can't think of it, but I know—I know that we did have some deletions and I don't remember what they were.

Q. Well, what would some of them possibly be; would you leave out windows?

(Vol. VII, p. 145)

A. You could possibly change the steel folding doors to a door which they had which was just a sliding door; that was a possibility.

Q. Did that happen?

A. I seem to remember one that we had, although I'm not positive of this.

Q. I will suggest that Plaintiff's tendered Exhibit 414, on Lot 190 for a B-1 slab has an invoice price of $3,057.78 and suggest that the Plaintiff's tendered Exhibit 480, on Lot 188, for a B-1 slab has the invoice price of $3,038.30 and, uh, I missed one; back up; suggest that Plaintiff's tendered Exhibit No. 384 on Lot 189 for a B-1 slab has an invoice price including tax and freight of $3,092.61 and suggest that Plaintiff's tendered Exhibit 401, relating to Lot 187 on a B-1 slab has an invoice price of $3,058.65; suggest that Plaintiff's tendered Exhibit 630 on Lot No. 195, a B-1 type has an invoice price of $2,821.96; suggest that Plaintiff's tendered Exhibit No. 623 on Lot 196, which is a B-1 model has an invoice price of $3,087.14; suggest

that Plaintiff's tendered Exhibit 411, on Lot 182, a B-1 model, has an invoice price of $2,987.70; suggest that document 412, Plaintiff's tendered Exhibit on Lot 80, a B-1 model, has an invoice price of $2,995.91

(Vol. VII, p. 146)

suggest that Plaintiff's Document 96 on Lot 83, a B-1 model, has an invoice price of $3,057.90; suggest that Plaintiff's Document 586 on Lot 84, a B-1 model, has an invoice price of $3,047.11; suggest that Plaintiff's Document 579, Lot 401, a B-1 model has an invoice price of $3,073.60, and I don't know what this—what this is; I'll not use it, however Document 529—I don't know what the lot number is, it has two things wrong—might be able to check that and I'll reserve that.

A further suggest to you, Mr. Miles, that Plaintiff's tendered Document 504 on Lot 51 is a B-1 model has an invoice price of $3,034.10; and I suggest that Plaintiff's Document 519, on Lot 58, a B-1 model has an invoice price of $3,038.59.

I ask you, do any of those prices on these invoices which are all a matter of record surprise you?

A. Only two of them.

Q. Which ones?

A. The ones that were in the twenty-eight hundred.

Q. Maybe they were where we had the deletions.

A. Could be.

Q. Is there a time lag sometimes after a

(Vol. VII, p. 147)

contract is made before the credit of the purchaser is approved?

A. Oh, yes.

Q. All cases are different, aren't they, depending on the credit of the individual purchaser, of course?

A. Some difference; they are fairly consistent.

Q. What is the general timing?

A. I can't remember what it was then.

Q. All right.

By the Court: Well, Mr. Miles, if you are leaving this, where did you get the figure of $3,151.91?

Mr.Reutlinger: It is one of the invoices, if Your Honor please.

By the Court: Sir?

Mr. Reutlinger: This first invoice he referred to.

The Witness: There is an invoice for that figure.

By the Court: Well, is that the highest priced one, Mr. Miles, is that why you picked it?

The Witness: I couldn't

(Vol. VII, p. 148)

say why it is, but I am sure that there are other B-1 figures about this price, but certainly I don't have the documents.

Q. You had access to the documents; at one time you had them all, didn't you?

A. At one time, yes.

Q. In fact, you kept the records, didn't you?

A. Partial records. No, not all of the records; the accountant kept the—

Q. (Interrupting) Which did you not keep?

A. I did not actually keep the books; the accountants kept those.

Q. Well, except for Mr. Cooper you kept all of the records?

A. That's right.

Q. Between the two of you, you had it all?

A. That's correct.

Q. Did you have any weather problems during the construction of this subdivision?

A. I couldn't say for sure. As far as I know, there was the normal winter weather where you do have some

problems and you have good building days also; I don't remember anything unusual.

Q. You don't remember whether this was an

(Vol. VII, p. 149)

unusually bad spring?

A. No, I do not.

Q. We're talking about the spring of 1962 and 1963, aren't we?

A. Yes, well, true.

Q. This is when the trouble started?

A. That's right. I can't answer that because some winters are real good and some are not.

Mr. Reutlinger: Now, if Your Honor please, Mr. Miles is under our subpoena and this cross examination. I have talked to Counsel and we are surely going to accomodate Mr. Miles on his business matters, but we may not be through with him and I will keep Counsel advised if we call him as our witness.

By the Court: Well, it is now three o'clock, gentlemen.

Mr. Anderson: If the Court please, we may want to call Mr. Miles for some re-direct tomorrow morning.

By the Court: All right.

Mr. Anderson: Now, Mr. Miles has a problem in that there is a period of time in which he has to be out of town.

Mr. Reutlinger: We can accomodate him on that. You told me that; what was it?

(Vol. VII, p. 150)

Mr. Anderson: Well, it is the week after next.

Mr. Reutlinger: The week after next.

Mr. Anderson: Yes.

Mr. Reutlinger: We can accommodate on that if you will let him testify out of order.

By the Court: Ladies and gentlemen, remember the

admonitions of the Court and be in your seats at 9:30 in the morning.

(Whereupon at about the hour of 3:00 P.M. an adjournment was taken, to reconvene on Friday, June 12, 1970, at 9:30 A.M.)

* * * * * * *

TRANSCRIPT OF PROCEEDINGS

VOLUME VIII

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Friday, June 12, 1970.

* * * * * * *

(Vol. VIII, p. 3)

(Reconvened pursuant to adjournment, on Friday, June 12, 1970, at about the hour of 9:30 A.M. and the following proceedings occurred:

By the Court: All right, gentlemen; let's proceed.

Mr. Anderson: All right. Mr. Miles, will you take the stand, please?

First of all, Your Honor, the house purchase invoices which were referred to yesterday and which have been denominated as Plaintiff's Composite Exhibit 1-CC, we would at this particular time like to introduce into evidence.

By the Court: All right.

(Whereupon Plaintiff's Composite Exhibit 1-CC was received in evidence.)

Mr. Reutlinger: If Your Honor please, for purposes of clarification I believe Counsel used the word, "Invoices," and instead of invoices these are purchase orders.

Mr. Anderson: I haven't attempted to use those yet.

(Vol. VIII, p. 4)

Mr. Reutlinger: Oh, I'm sorry; you gave him something else that confused me.

Mr. Herman R. Miles, recalled as a witness, by the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Testimony of Mr. Herman R. Miles

Redirect Examination

By Mr. Anderson:

Q. Now, Mr. Miles, first of all, you gave us reference to an invoice yesterday in the amount of $3,151.91. Can you tell us, of the invoices which I have just introduced into evidence, which item number that particular invoice is?

A. It is Item 4, No. 434.

Q. All right sir; and have you over night made an analysis of Item 434 and, uh, to the extent possible, the other items to which Mr. Reutlinger referred in his cross-examination of you yesterday?

A. Yes, I have.

Q. Now, let's start out with Item 434. Now, would you explain to the jury, please, first of all, uh, tell us what lot number of house that was?

A. That was Lot No. 215.

Q. And was that a 1961 or 1962 house?

(Vol. VIII, p. 5)

A. It was a 1962.

Q. At the time you made the analysis of these figures, initially, which I think you have told the jury before was, uh, sometimes prior to June of 1962 was Fortner Enterprises already receiving 1962 packages from U. S. Steel?

A. Yes, they were.

Q. All right. Now, would you explain to the jury—give me the amount again of that invoice.

A. The invoice was $3,151.91.

Q. All right. Would you explain to the jury why this invoice was used in the comparison that you testified about yesterday?

A. This particular house pattern was a B-1 pattern, a B-1 model—that was on a slab.

It contained certain options that we wanted to use as a type house that we wanted to sell.

I used the items that were in this particular invoice to compare with the conventional house and the Empire house that we obtained prices on; in other words it contained the same options.

Q. All right. Now, what were those options that this particular house containing that is the subject matter of this Item 434?

(Vol. VIII, p. 6)

A. It contained steel closet doors, which was—the price of that was $50.75. The light fixture package was $50.00 and the range and oven was $145.15.

Q. All right; now, how then do you get the $3,151.91 figure?

A. The basic price in the U. S. Steel home for that particular model was $2,786.

Q. All right.

A. Plus tax of $89.91 and a freight charge of $65.10.

Q. Does that then total the $3,151.91?

A. Yes, it does.

Q. All right. Now, just so there will be no misunderstanding; in the conventional home and the Empire home which you figured, did that include steel closet doors?

A. It did.

Q. Did it include the light fixture package?

A. It did.

Q. Did it include the range and oven?

A. Yes sir; it did.

Q. Is this the same or different range and oven from that in the U. S. Steel package?

(Vol. VIII, p. 7)

A. It is the identical oven and range that was used in U. S. Steel Homes.

Q. Now, if you delete the range and oven from this invoice—check my mathematics and see if that would come to $3,006.76?

A. That is correct.

Q. All right; you gave us in your original figures for the conventional home a figure of $2,696.48?

A. Yes sir.

Q. Is that correct?

A. Yes sir.

Q. And you have told us that that included the range and oven at a particular price?

A. Yes sir.

Q. What was that price?

A. It was $153.98.

Q. Check my math again and see if I have correctly subtracted from the $2,696.48?

A. Yes sir.

Q. And that comes to $2,542.50?

A. That is correct.

Q. All right. Now, if we subtract the $2,542.50 from the $3,600 that I took over here by taking the range and oven of the U. S. Steel package

(Vol. VIII, p. 8)

what difference do we get, and check my mathematics to see of $464.26 is the difference?

A. That is correct.

Q. Now, on the Empire Homes that you figured up yesterday, I believe the figure you gave us was $2,708.65?

A. That's—yes sir.

Q. Okay; try to squeeze that invoice down here; $2,708.65. Now, would the figure for the range be the same?

A. It would be the same, $153.98.

Q. Check my math on the subtraction of that.

A. That's—yes sir; correct.

Q. So, that would be $2,554.67?

A. Yes sir.

Q. Now, if we likewise subtracted that from the U. S. Steel package from which the range has been deleted or eliminated, if my subtraction is incorrect, or could you check my subtraction and see if I am right?

A. Yes sir.

Q. That would be a difference then of $452.09 on the Empire house as compared to the original difference that you computed of $443.26?

A. Yes sir.

(Vol. VIII, p. 9)

Q. And on the conventional home you originally computed $455.43 and by eliminating the range and oven it would be $464.26?

A. Yes sir.

Q. All right. Now, have you analyzed each of the—or, as many—well, let's just start out here. I tried to make a list of the items to which Mr. Reutlinger referred in the course of cross-examination yesterday and the first one that I have an invoice or an item is Item 478.

Now, have you checked to determine the lot number on that one?

A. Yes sir; it's Lot 210.

Q. Before I—I'm getting a bit ahead of myself, sir. Do you have with you the delivery orders that were prepared on these houses?

A. Yes, I have.

Q. And first of all, do you have the delivery order for Lot No. 215 which is the base invoice to which we have just been referring?

A. Yes, I have it here.

Q. Does this delivery order show the options to which you refer?

A. Yes, it does show the options. It shows

(Vol. VIII, p. 10)

the steel folding doors at $50.75; it shows the range at $145.15 and the light fixture package at $15.00. This delivery order also shows the basic price and the sales tax, however it does not show the delivery charge which is added to the invoice when it is issued.

Q. Now, referring to Document 434 which is the invoice, would you tell the jury whether the figures on the invoice with the exception of the delivery charge, are the same as those appearing on the, uh, I've forgotten what I said.

I want to know if the figures on the delivery order are the same as those on the invoice?

A. Yes, they are the same with the addition of the freight charge which is added onto the invoice bringing the total to $3,151.90?

Q. All right.

A. Now, getting back to the first item to which Mr. Reutlinger referred yesterday, No. 478—uh, I'm sorry, Your Honor. I would like to offer this delivery order in evidence.

By the Court: Let it be filed.

(Whereupon a document entitled "Dealer Purchase Order No. 215

(Vol. VIII, p. 11)

dated September 20, 1961, was marked for identification as Plaintiff's Exhibit No. 60 and received in evidence.)

Testimony of Mr. Herman R. Miles

Q. Now, on Item 478, can you tell us which lot this is?

A. This is Lot 210; this is a 1961 model and this is a crawl space.

Q. What type crawl space?

A. It's a B-1 crawl.

Q. All right.

A. All of these are B-1's that we refer to.

Q. Some of these are crawls and some basements and some—

A. (Interrupting) Some basements and some slabs.

Q. All right. Now, sir, are the options on that delivery ticket the same as the options on the Lot 215 which is our base invoice?

A. No, neither the basic price or the options are the same.

Q. All right; what is the basic?

A. The basic price is $2,803 and then in the

(Vol. VIII, p. 12)

extras are the options, the folding steel doors which were $77.85; the light fixture package, $14.55 and the gable overhang was $53.90.

This is the total options that were used on this house. In addition to this, we have a tax of $88.48 and a freight charge of $65.10, making a total of $3,102.83.

Q. Now, sir, I would refer you to Item 478, the invoice, and ask you what the amount of that invoice is, or if you have already—have you already checked those, Mr. Miles?

A. Yes, I have checked them.

Q. All right; then we could save some time; what was the amount of the invoice?

A. Amount of the invoice was $3,102.83.

Q. Okay. Now, sir, is there anything left out of this B-1 crawl that is on your basic house that you used?

Testimony of Mr. Herman R. Miles

A. Yes, there is. The differences are, in this particular house, it does not have the oven and range, however, it added an additional option that the original item did not have.

Q. All right.

A. And the amount of that oven and range was

(Vol. VIII, p. 13)

a hundred—

Q. (Interrupting) You know what the amount of the oven and range was for a 1961 model?

A. I do not have, uh, that particular house showing it, but I do have a 1961 model on a slab with an oven and range which I'm sure would be the same.

Mr. Reutlinger: Well, if Your Honor please, I thought we were comparing this invoice by invoice. If he is going to put other items on this particular invoice, I suggest the price will be raised, but it was not in the invoice I read from yesterday.

By the Court: Well, he is not putting it in the invoices; he is just pointing out the fact that it was not in the $2,803.

Mr. Reutlinger: That is correct; and it was not—these are—

By the Court: (Interrupting) Well, I will let him do that. All right.

Q. What is that price?

A. I have a price, 1961 oven and range of $195.90.

By the Court: Well, Mr. Miles, the range wouldn't have been more expensive in 1961 than it was in 1962.

(Vol. VIII, p. 14)

The Witness: Sir, I—the only thing that I have to go by is the charge for the range in 1961 models from invoices that I have here.

Mr. Anderson: We have three or four of these, Your Honor, to which we are going to refer.

By the Court: Well, in any event, if it was the same it would be $145.

Mr. Anderson: Yes sir.

Q. If this particular house to which Mr. Reutlinger referred had the oven and range for the 1961 model in it, what would the total of the invoice have been?

A. Well, the way that you have it there, it would have been $3,298.73, however, the one we referred to did not have the gable overhang, so you would have a deduction of $53.90 from this.

Q. All right; and if the figure for the oven and range were $145, that would be about—

A. (Interrupting) Fifty dollars less.

Q. (Continuing)—fifty dollars less; all right. Would that have been less than or more than the amount of the invoice that you have used as the base?

A. Even deducting or changing it to $145

(Vol. VIII, p. 15)

deducting the gable overhang, it would have still have been slightly more than the item we referred to in 434.

Q. All right. Now, the next note I made, the invoice to which Rr. Reutlinger referred was Item 589 and have you checked that one to determine the lot number?

A. Yes, I have; it was Lot No. 389, a 1962 model; it was a B-1 slab. The basic price of the package was $2,786. The options had were a sliding glass door for $52.20.

Q. $52.20?

A. $52.20 and, as listed on this delivery order as attachments only by numbers, and I cannot determine what actual numbers these mean, it was an item that added up to $50.66.

Q. $50 and how many cents?

A. Sixty-six cents.

Q. All right.

A. Tax, $72.22 and freight of $65.10. This is a total of $3,068.13.

Q. Does this have the oven and range in it?

A. No, it does not.

Q. The next item to which Mr. Reutlinger referred was No. 414.

(Vol. VIII, p. 16)

A. This is No. 190 and it was a1962 model. It was a B-1 basement; basic price, $2,810. It had options of steel closet doors, $58.65; light fixtures of $13.50; and it had, as they refer to other attachments which are not listed, of $60.65 and a credit on the kitchen cabinet arrangement of $39.05. Now, that was a credit.

Q. Of $39.05?

A. True, and a tax of $87.12 and a freight of $66.81, for a total of $3,057.78; this is the total options and everything.

Q. All right; this credit on kitchen cabinets, does that mean that no kitchen cabinets were put in or that some less expensive ones?

A. No, just a difference in the arrangement of the cabinets is the way I seem to remember that.

Q. All right; was there an oven and range in this one?

A. No, there was not.

Q. The next item I noted was No. 384.

A. This was Lot 198 and it was a 1962 model B-1 slab; basic price was $2,786.

It had options of steel closet doors, $50.75; light fixture package of $15; other attachments of

(Vol. VIII, p. 17)

$87.66 and tax of $88.18 and freight of $65.10, totaling $3,092.59.

Q. Did this one have an oven and range?

A. No, it does not.

Q. Now, this was a 1962 model; what was the oven and range price?

A. $145.15.

Q. If you add the oven and range to the $3,092 price that you have got there is that more or less than your basic invoice that you used?

A. Yes, it is; it would be in the thirty-two hundreds.

Q. All right.

A. $3,237, approximately.

Q. And it would be more because of these?

A. Because of these other attachments.

Q. These other attachments?

A. Otherwise it's the identical house.

Q. All right. Now, miscellaneous items such as were on this Lot 189, were they in the base that you used?

A. No, they were not in the base.

Q. All right; the next number I believe is No. 480?

(Vol. VIII, p. 18)

A. Item 480 is Lot No. 188, a 1961 model B-1 basement. The basic price was $2,743. Steel closet doors were $75.15; light fixture package of $14.55; gable overhang of $53.90; tax, $86.60; freight, $55.10, for a total of—

Q. (Interrupting) $55 or $65?

A. $55.10.

Q. All right.

A. And a total price of $3,038.30.

Q. Any oven and range in that one?

A. No, there was not.

Q. The next item is No. 401.

A. Lot 187 and this was a 1962 crawl, B-1 crawl; basic price was $2,792 and it had options of steel closet doors, $50.75.

Q. $50.75?

A. $50.75; light fixture package of $15, and you had other attachments of $87.66; a credit on rearrangement of the kitchen cabinets of $39.05; tax of $87.19 and freight of $65.10, for a total of $3,058.65.

Q. Any oven?

A. No, sir; no oven and range.

Q. The next item I have is 630.

(Vol. VIII, p. 19)

A. This is Lot No. 195 and it was a 1962 B-1 basement; at a basic price of $2,810. It had extras of $58.65 and a light fixture package of $13.50; a credit on kitchen cabinets of $39.50 and a credit on not using some of the interior panels, as this particular house was used as an office and some of the panels were not installed at that time, of $147.12; tax, $80.80 and a freight of $65.10, for a total of $2,840.96.

Q. All right sir; on this one, any oven or range?

A. No oven and range.

Q. Now, what is the effect of these two credits?

A. Well, this brings it down at the lowest price a B-1 model was brought out yesterday, one that I could not understand the price until I checked the delivery ticket on it.

Q. All right sir; did this one have a closet door in it, sir?

A. Six hundred thirty, yes, that has closet doors of $58.65.

Q. What is the difference between the one that you used as a base and this particular one?

(Vol. VIII, p. 20)

A. There are several differences; one, this is a basement model where I used a slab, so the basic price is slightly higher.

It is slightly higher for the closet doors because there

is an additional door going to the basement. The light fixture package is approximately the same and the kitchen cabinet arrangement was slightly different, so there was a credit on it and all of the interior panels were not used as this was used for an office and this gave us another credit.

Q. The next item, 623 I believe.

By the Court: How many of these are there, Mr. Anderson?

Mr. Reutlinger: Fifteen all told, Your Honor.

Mr. Anderson: One, two, three, four, five, six.

Mr. Reutlinger: Fifteen all told; we are about half way down.

By the Court: Well, in the interest of time can it be stipulated that the comparison of these invoices about which Mr. Reutlinger questioned yesterday, what he would testify to today follows, in substance, the line of these that you have put on the

(Vol. VIII, p. 21)

board bringing the price more near to the base price of the $3,150 used by him on his direct testimony yesterday?

Mr. Anderson: Definitely, Your Honor; that's exactly the purport of the testimony.

By the Court: Well, that's why I wondered if it is necessary that we go all through all thirteen of them. I think the jury understands that now. What is back of his testimony yesterday—I thought the jury got the impression that he had reached in and taken a high one to compare against these other two and that's why I put the question to him that I did and I think he has explained his position—not necessarily—you don't have to believe it if you don't want to, but he has explained it. You don't have to believe any witness if you don't want to believe him. All right.

Mr. Anderson: All right, Your Honor; what we would

like to do then, if the Court please, is offer into evidence all of the delivery tickets or delivery orders that we have pertaining to, and if I just might read them out so the record will be clear, pertaining to Items 478, 589, 414, 384, 480, 421, 630, 623, 411, 609, 586, 579, 504 and 519.

Now, I have written it down as Item 529, so

(Vol. VIII, p. 22)

I have in that stack both 529 now and 519.

By the Court: All right.

Mr. Anderson: Now, we did not have delivery orders which we could find pertaining to Items 412 and what I have noted as 497, but I don't believe you refer to an Item 497.

Mr. Reutlinger: I don't. My notes show that I did not —in fact I don't know if we have a 497.

Mr. Anderson: Well, so, the ones we don't have then pertain to Item 412.

By the Court: All right.

Mr. Reutlinger: No objection.

Q. (By Mr. Anderson Continued) Now, sir, again so the record will be clear did you refer in your analysis last evening to some additional delivery orders pertaining to B-1 models to which Mr. Reutlinger had not referred yesterday?

A. Yes, I did.

Q. What was the lot number of the first one to which you referred?

A. I referred to Lot 26.

Q. Okay; and I believe invoice No. 635?

A. Item 635, right.

(Vol. VIII, p. 23)

Q. Item 635.

A. And this was a 1961 B-1 slab with a basic price of $2,795.

Q. $2,795?

A. That's right; $2,795. This had a light fixture package of $14.55. It had an oven and range of $195.90, a gable overhang of $53.90, tax, $91.78; freight of $60.90, which gave a total of $3,212.03.

Q. Now, does this have other items in it that your base one did not have?

A. Yes, this has a gable overhang in it of $53.90 that my basic item did not have, however, it does not have steel closet doors which the basic item was $50.75, or pretty close to even on the deletion and the addition.

Q. All right sir; and is this one more or less than the base one that you used?

A. It is more.

Q. And why is it different?

A. Because the price of the oven and range was in this invoice, in a 1961 model, more than the price of the range on the 1962 model.

Q. Are there others, sir, of that nature that are more than the base one that you used because

(Vol. VIII, p. 24)

of the components being different?

A. Yes, there is; there are several more.

Q. All right. Mr. Reutlinger referred yesterday to what has been marked as Defendant's Exhibit No. 125 and on the third page of that document, which says—what does it say about the package for the U.S. Steel homes?

A. It says, uh, U.S. Steel Homes package cost. This is, uh, is more of an example including the basic price and the varions options that could be added.

For example, it shows the basic price of the home as $2,769. Then, in this particular case it shows a furnace and a gas vent, duct and vent package, water heater and light fixture package which brings this one to $3,018.95, however,

this is not the components that we used in the construction of this house.

Mr. Anderson: All right, sir. May it please the Court; that are a few additional dealer purchase orders which we would like to introduce into evidence as samples of those that represent ones that were higher than the base.

By the Court: Very good. Separate all of them and give them numbers.

(Vol. VIII, p. 25)

Mr. Anderson: If the Court please, we will have to figure out the numbering at a recess. That it all, Your Honor.

Recross-examination

By Mr. Reutlinger:

Q. Mr. Miles, if you would, place before you the dealer purchase order of Lot 215. Can you readily find that?

A. I don't have it—yes, I have it.

Q. That is the base and we are using that word because that is the one you first talked about yesterday.

A. Yes sir.

Q. Now this, as you see on it, has several options, such as the furnace, or, does not have a furnace and range on it.

A. This has an oven and range, but no furnace.

Q. I see, yes, oven and range, no furnace. I take that back; and this otherwise shows that the order had no oven and range?

A. Yes sir.

Q. And of course you could have ordered a furnace in some or you could not have ordered a furnace.

(Vol. VIII, p. 26)

A. We ordered no furnace.

Q. You could have?

A. Could have, yes.

Q. My purpose in questioning you along this line is that these options are exactly that and even though you ordered a home package, the basic package, you were not compelled to order, for example, the options or the extras such the oven and range, were you?

A. No, sir; we were not compelled to do it.

Q. All right; and you could still get the package, basic package?

A. (Witness nodded head affirmatively.)

* * * * * * *

Q. Now, yesterday somewhere back down the line we talked about the Empire Homes bid, I guess you would call it, or projection for a B-1 basic package delivered; you recall that?

A. Yes sir.

Q. And that figured, you can refer to that exhibit if you want to refresh yourself; I'm reading from it and it is up there for you, in October, Empire Homes quoted to Mr. Fortner a delivered basic B-1 package at $2,114, correct?

A. I don't know.

Q. Well, I say, you may refer to—it is

(Vol. VIII, p. 27)

that letter of October the 18th; that is this $2,114, delivered.

A. $2,614.

Q. I'm sorry; $2,614 delivered.

A. Yes sir.

By the Court: Now, while we are reconstructing that let's take a short recess.

(Whereupon at about the hour of 10:26 A.M. a recess was taken to 10:40 A.M. and the following proceedings occurred:)

Q. (By Mr. Reutlinger Continued) Mr. Miles, I have

got some fresh ammunition here. We are talking about a B-1, of course, with this Lot No. 215 that we have in mind and I'll put B-1 and over here you have already told us that the basic package does not require options?

A. Yes sir.

Q. So, I'll put a little package—no, no option required and then before we ran out of ammunition we had agreed that Empire had said they would deliver the package for $2,614 and that is without tax, I believe they say in their letter.

A. I'm really not familiar enough to say

(Vol. VIII, p. 28)

without looking because I'm not really familiar with this.

Q. Would you just read the third line of the letter?

A. Third?

Q. "The above—"

A. Yes sir.

Q. No tax, but is it delivery?

A. Yes.

Q. Now yesterday, and again today, you referred to Exhibit No. 125 which shows the basic package at $2,769—you're looking at the wrong exhibit, Mr. Miles; the one Mr. Anderson closed with.

A. Yes.

Q. I think on the third page.

A. Yes sir.

Q. Basic package, $2,769, and that's U. S. Steel Homes, $2,769.

Now, there is a delivery charge, I believe which should be added on and you did give us the fact of the delivery charge with Lot 215, but will you give us the figure of the delivery charge from the Lot 215, the one used as your base?

A. It was $65.10.

Q. Let's leave off the ten cents for arithme-

(Vol. VIII, p. 29)

tic's sake.

A. All right sir.

Q. There is a delivery charge. Now, this is before the sales tax is figured in, either one of them, so there is no point in adding that.

A. Yes sir.

Q. Now, your dealer purchase order in Lot 215 has a base price, or the basic home package price of $2,796, doesn't it?

A. Yes sir; yes.

Q. And we know there is a delivery charge there, of course, same one. Now, this is Lot 215 and this is the estimate. Now, we have three basic columns. Now, you told us yesterday that the Empire Homes quoted package was comparable but that there were some extras and I think you mentioned the spackle compound and the use of metal doors and metal shelving as against wooden shelving and we will not go into the—you said it was pennies, but there are some extra costs in this estimate and in this as opposed to the Empire Homes, spackle compound was one; you recall that?

A. Yes, I recall.

Q. All right. Well, I just—without getting into it, we will put some extras in and put

(Vol. VIII, p. 30)

ditto marks across and you also told us yesterday that Empire Homes offered no advertising assistance and had no field engineering service; you recall that?

A. I don't believe that I said that they did not. I said I didn't know.

Q. Well, then my recollection of your testimony is correct?

A. Because I didn't know whether either one of them did.

Q. What, advertising assistance?

A. Yes.

Q. Well, does—did Empire, to your knowledge, offer advertising assistance?

A. No, not to my knowledge.

Q. All right; not to H.R.M.'s knowledge, advertising, and did you tell me—I thought you said no yesterday, but maybe I am mistaken, and did you tell me yesterday that they had no field engineering service?

A. I don't believe I said it.

Q. You don't believe you said that and I was mistaken when I wrote that down.

A. I don't know whether we were talking about, uh, Empire Homes at that time or not.

Q. Yes sir; I am certain we were because

(Vol. VIII, p. 31)

we were dealing this October 1962 letter.

A. Could be.

Q. Well, I'll put down "Could be" in this.

A. At least I have no knowledge of any.

Q. Well, I am speaking of your testimony yesterday, Mr. Miles.

A. Yes.

Q. And instead of saying "Not" it should be "No knowledge" and I'm going to put down here, "Could be no field engineering". Now, one more question, Mr. Miles; the price of the home package, with or without options, has nothing to do with whether the proposed building is on slab, crawl or basement, does it?

A. Would you repeat that one, please?

• • • • • •

Colloquy

(Vol. VIII, p. 77)

Proceedings Occurred.)

Mr. Anderson: First of all Your Honor, at the last time that I was reading documents, I failed to move for the admission of these last group of documents that I read before we adjourned, through the last one I read, which was Plaintiff's Exhibit No. 17.

By the Court: All right.

Mr. Anderson: I would move their admission before I forget it.

(Whereupon Plaintiff's Exhibit No. 17, and Related Documents Was Received in Evidence.)

Mr. Reutlinger: If Your Honor please, this brings me to mind and I will as Mr. Anderson, did we get into evidence these various invoices that I read from yesterday and you referred to today?

Mr. Anderson: Yes.

Mr. Reutlinger: That's what I thought.

Mr. Anderson: I introduced all of them.

Mr. Reutlinger: I just wanted to make sure of that.

(Vol. VIII, p. 78)

Mr. Anderson: The next, I will read Paragraph 13 of the request for admissions—I'm sorry, Paragraph 14 this is:

(Reading) "That Document 41 is a one page letter from David H. Boyd, President of the Homes Division, to R. C. Dyas, Vice-President of the Credit Corporation, dated June 13, 1961 and that said document was prepared in the regular course of business by the United States Steel Corporation and that it was delivered to United States Steel Homes Credit Corporation."

That document reads as follows, addressed to Mr. Dyas:

Colloquy

(Reading) "Dear Dick: Under date of June 5th Harry Black forwarded to me, with copy for Bill Rollins, a memorandum concerning Fortner Enterprises Incorporated.

It was the intention of the Sales Department to consider the contents

(Vol. VIII, p. 79)

of that memorandum as a request for special financing. In an sense it is, but I believe it relates largely to the financing situation with this dealer, and it may well be that a discussion with Mr. Fortner prior to processing any formalized request in this case would be in order.

Indications thus far are that Mr. Fortner has done a better than satisfactory job of introducing United States Steel Homes' product in his Louisville subdivision. It is apparent that he has spent considerable time, effort and money in promotional activity, but he does not yet have sufficient houses built and closed to provide for a normal turnover of money to meet the costs which he has thus far incurred.

(Vol. VIII, p. 80)

"I would appreciate it if you would review the problem with him."

We would move the admission of Plaintiff's Exhibit No. 41, Your Honor.

By the Court: So ordered.

(Whereupon Plaintiff's Exhibit No. 41 Was Received in Evidence.)

Mr. Anderson: Next, I will read from Paragraph 15 of the request for admissions:

(Reading) "That Document 69 is a five page memorandum from W. L. Rollins of the Credit Corporation to R. C. Dyas of the Credit Corporation dated June

26, 1961 and that said document was prepared by the United States Steel Homes Credit Corporation in the regular course of business and delivered to and received by the United States Steel Corporation and maintained by it in the regular course of business."

I am going to read—this is a long one so I'm going to read parts of it, starting with the "Com-

(Vol. VIII, p. 81)

ments" Section on Page 3:

(Reading) "The improved lots which are the subject of this request are situated in the middle of the initial section of Golden Meadows Subdivision and are surrounded by existing homes which seem to be well maintained. Mr. Fortner reports several sales are available to him on said lots and he is presently in the process of erecting four of our houses thereon aided by local financing.

In viewing the subdivision, particularly that portion covered by our existing loan, the dealer has practically completed development of the small section of seventeen lots (Section 1-F) which was the initial development phase provided for under our loan so as to test the market, and is making rapid progress with the development work in the adjacent section (1-D) comprising ninety-six lots."

(Vol. VIII, p. 82)

"It appears that he has done a very good job with his models and his sales pricing seems to be below that offered by competitors. This should furnish reasonable assurance of capturing a better than fair share of the available market with the present unknown factor being, of course, the ability to maintain adequate volume to absorb overhead costs and realize a profit.

As previously indicated herein Mr. Fortner stated that he needed the amount requested over and above that required to retire the existing mortgage to replenish working capital which had been depleted to date due to various delays. In this connection, in our discussion I informed Mr. Fortner that expenditures of this nature are normally borne by all builders and in many instances represents about the only risk capital a builder provides.

I further informed him that I

(Vol. VIII, p. 83)

felt that a construction loan on the lots in question with provision for disbursement of sufficient funds to retire the existing mortgage would probably be made but that it was difficult to justify a loan such as he was requesting in view of the substantial front money exposure we had incurred in our existing loan. Mr. Fortner took the position that he was entitled to the same consideration on this request as he received on the original loan.

In my opinion the expenditures heretofore made for promotional activities, model furniture, overhead and so forth, represents about the only capital injection made in connection with our existing loan and another one hundred per cent loan to enable a recapture of a part of such expenditures is not justified. However, should it be determined to authorize such a loan, the following

(Vol. VIII, p. 84)

terms and conditions are suggested."

Then, the terms and condition are set forth. We move the admission of that document, Your Honor, and that is Plaintiff's Exhibit No. 69.

Colloquy

Next, I will read Paragraph No. 16 of the request for admissions:

(Reading) "That Document 68 is a one page letter from W. L. Rollins of the Credit Corporation to R. C. Dyas of the Credit Corporation, dated June 26, 1961 and that said document was prepared by United States Steel Home Credit Corporation in the regular course of business and delivered to and received by United States Steel Corporation and maintained by it in the regular course of business."

This is addressed to Mr. Dyas and it reads:

(Reading) "Reference is made to Mr. Boyd's letter addressed to you under date of June 13, 1961, relative to the request submitted by

(Vol. VIII, p. 85)

the subject dealership for financing on approximately thirty-two additional lots in the Golden Meadows Subdivision, in which letter it was requested that the Credit Corporation review with Mr. Fortner his problem prior to any formalized processing of the case.

On June 20, 1961, accompanied by Mr. Grayson of the Homes Division and Mr. Leonard of the Credit Corporation I met with Mr. Fortner on this matter and attached is a memorandum regarding his request.

There can be no question that the dealer has incurred substantial expenditures of which he has been unable to recover any portion to date. After discussing the matter with Mr. Fortner I can only conclude that a loan on any basis other than that which he has asked for would be unacceptable to him.

I am forwarding copies of this

(Vol. VIII, p. 86)

letter and enclosure to Mr. Boyd and Mr. Black so they will be in a position to discuss the case with you."

Colloquy

That is Plaintiff's Exhibit 68 and we move its admission.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 68 Was Received in Evidence.)

Mr. Anderson: Next I will read Paragraph 17 of the request for admissions:

(Reading) "That Document No. 40 is a two page letter from David H. Boyd, President of Homes Division to W. H. Lang, President of the Credit Corporation dated June 29, 1961 and that said document was prepared and maintained in the regular course of business by the United States Steel Corporation and that it was delivered to the United States Steel Homes Credit Corporation."

That document reads as follows:

(Vol. VIII, p. 87)

(Reading) "Under date of June 5, I received in this office the attached recommendation from Harry R. Black, Vice-President-Sales, covering an additional financing request under the special program for the subject dealer.

Since I recognized after a review of the recommendation that the request was, in effect, an extension of and directly related to the existing program which this dealer is now following, I suggested to R. C. Dyas that a preliminary discussion be held with the dealer pending the processing of any formal action. This discussion was held on June 20 by W. L. Rollins, and a copy of Mr. Rollins' report was sent to this office.

Subsequent to its receipt I have discussed the subject more fully with Harry Black, and despite the liberal nature of the request and

(Vol. VIII, p. 88)

proposal, it is his judgment that this additional financing provides an important commercial benefit to us in the Louisville area. He has indicated to me that the dealer is earning a profit on the sale of the product and has further stated that the dealer has in excess of thirty-five sales ahead. Assuming that these can be closed this year, they should be sufficient to permit the dealer to liquidate his 1961 indebtedness on schedule.

Control will continue to be exercised over the dealer's operations in order to prevent the possibility of speculative building. Our Treasury Department indicates that dealings thus far have been satisfactory.

Consequently, it is recommended that consideration be given to further negotiations with Mr. Fortner so that a continuing program may be provided."

(Vol. VIII, p. 90)

That is Plaintiff's Exhibit No. 40 and we move its admission.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 40 Was Received in Evidence.)

Mr. Anderson: Next, Paragraph 20 of the request for admissions:

(Reading) "That Documents Nos. 242, 243, 244, 245, 246, 247, 248, 249, 250, 251 and 252 are memorandums from W. L. Lieber, Assistant Treasurer of the Homes Division to D. H. Boyd, President of Homes Division and that said documents were prepared and maintained by the United States Steel Corporation in the regular course of business."

I will read these in reverse order in order to get them in the proper sequence of dates. First—the first one is dated July 27, 1961.

(Reading) "The first loan made to the subject dealership by the Credit Corporation was consummated on Oct-

(Vol. VIII, p. 91)

ober 28, 1960. The land acquisition loan is secured by two notes. One note in the amount of $88,000 matured on December 31, 1961 and the second in the amount of $231,920 matures on December 31, 1962.

The construction loan on one hundred eighty-seven lots is also secured by two notes. One note in the amount of $373,200 matures on December 31, 1961, and the second note in the amount of $1,362,180 matures on December 31, 1962.

The first shipments made to this project known as Golden Meadows were five models beginning on November 22, 1960. Since that time thirty additional orders have been received and all but four have been shipped. The date of the last order received was July 20, 1961 and the last shipment was on July 25.

(Vol. VIII, p. 92)

The five models are still being used for display purposes. The Credit Corporation has disbursed on seventeen cases, including the five models. Four cases thus far have been closed through permanent mortgages.

The second loan has not yet been consummated. The Credit Corporation is awaiting certain documents from Fortner and on exceptional delay is anticipated.

The account with the Homes Division is current and satisfactory and the Credit Corporation reports a good relationship."

The next document, Document 251, now, I am not going to read all of it because it is, in part, a re-hash of what I have just read, but the portion I do wish to read is as follows:

(Reading) "The experience of the Credit Corporation and the Homes Division in their transactions with this dealer has been satisfactory."

That is dated August 29, 1961. Now, here is

(Vol. VIII, p. 93)

one dated December 11, 1961:

(Reading) "Both the Credit Corporation's and the Homes Division's accounts are satisfactory. Interest on the loans by the Credit Corporation is paid up to date and the Homes Division's Miscellaneous account is current. A portion of the miscellaneous account is now past-due but credits are being processed by the Order Service Division to balance the account."

Here is one dated April 6, 1962:

(Reading) "Although sales are much slower than had been anticipated, the account appears to be satisfactory. The accounts with both the Credit Corporation and Homes Division are current."

Here is one dated May 8, 1962:

(Reading) "The accounts with both the Credit Corporation and the Homes Division are current and

(Vol. VIII, p. 94)

satisfactory."

Here is one dated June 6, 1962:

(Reading) "Although sales have slowed down considerably, the accounts with both the Credit Corporation and the Homes Division are in a current status."

We will offer those into evidence, Your Honor as Plaintiff's Exhibits.

(Whereupon Plaintiff's Exhibit Nos. 242, Through 252, Were Received in Evidence.)

Mr. Anderson: Next, I will read Paragraph 23 of the request for admissions:

(Reading) "That Document 126 is a one page memorandum from David H. Boyd, President, Homes Division, to W. L. Rollins, Assistant General Manager of Credit Corporation, dated July 10, 1962 and that said document was prepared and maintained in the regular course of business by the United States Steel Corporation and delivered by its to the United States

(Vol. VIII, p. 95)

Steel Credit Corporation."

This memorandum from Mr. Boyd to Mr. Rollins read:

(Reading) "Dick Dyas called me today and after some discussion, he informed me that the following steps would be taken with respect to Fortner's indebtedness:

1. The matter would be turned over the John Bird for handling.

2. A letter of demand for payment would be forwarded to Fortner, accompanied by a copy of the Ernst and Ernst audit recently completed.

At Dick's request I informed Al Reutlinger of this decision and told him that he would at least be advised when the letter was forwarded to Fortner so that he would be completely up to date. Would you please be sure that he is so advised?"

(Vol. VIII, p. 96)

Move the admission of that document, Your Honor.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 126 Was Received in Evidence.)

Mr. Anderson: Paragraph 25 of the request for admissions:

(Reading) "That Document 237 is a five page contract entitled "Underwriting Agreement Between United States Steel Home Credit Corporation and United States Steel Homes Division, United States Steel Corporation, dated March 30, 1962; that said contract was duly authorized and executed by the respective parties and maintained by the United States Steel Corporation in the regular course of business."

This is the underwriting agreement:

(Reading) "This agreement, made as of this thirtieth day of March, 1962, by and between U. S. Steel

(Vol. VIII, p. 97)

Homes Credit Corporation, a Corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called Credit Corporation, and United States Steel Homes Division, United States Steel Corporation, a Corporation organized and existing under and by virtue of the laws of the State of New Jersey, hereinafter called the Homes Division;

Whereas, Homes Division from time to time has requested Credit Corporation to make loans to or for the benefit of certain of its franchised dealers for the purpose of assisting such dealers in the financing of residential projects utilizing products of Homes Division, and Credit Corporation has made such loans; and

Whereas such loans have been requested and made pursuant to certain authorities granted by the Finance Committee of United States Steel Corpor-

(Vol. VIII, p. 98)

ation and the Board of Directors of Credit Corporation, with the intent that any and all loss which might be incurred by Credit Corporation in the liquidation of such loans should be underwritten by Homes Division; and

Whereas all such loans as have been previously requested and underwritten by Homes Division which have not been fully liquidated at the date hereof or listed in the schedule attached hereto styled and identified as "Loans Guaranteed by United States Steel Homes Division as of March 30, 1962," (hereinafter called Guaranteed Loans) and

Whereas it is contemplated that additional loans in the future shall be requested by Homes Division and made by Credit Corporation with the intent that any and all loss which might be incurred by Credit Corporation in the liquidation of such loans

(Vol. VIII, p. 99)

shall be underwritten by Homes Division; and

Whereas the parties hereto desire to define more fully their mutual intent with respect to the underwriting of all such loans, now therefore in consideration of the mutual promises hereinafter set forth and other valuable considerations, the parties hereto agree as follows:

1. Homes Division hereby

(A) agrees to pay unto Credit Corporation any and all loss which may be incurred by Credit Corporation on account of any balance or principal and interest of any of said guaranteed loans remaining unpaid upon exhaustion of Credit Corporation of all effort for the collection thereof as may be practicable, together with all direct costs and expense of collection; such payment to be made upon demand

(Vol. VIII, p. 100)

by Credit Corporation and

(B) consents that the maturity date of said guaranteed loans may be extended, or the terms of any of said loans may be otherwise modified by Credit Corporation

without affecting the obligation of Homes Division under this underwriting agreement, and waives all diligence, presentment, notice and defenses based thereon.

2. The parties hereto agree

(A) that any additional loan to be underwritten in the future by Homes Division shall be made by Credit Corporation only after receipt of an instrument in writing, duly executed by Homes Division, which shall expressly provide that Homes Division

(1) agrees to pay unto Credit Corporation any and all loss which may be incurred by Credit Corporation on

(Vol. VIII, p. 101)

of account of any balance of principal and interest of such loan remaining unpaid upon exhaustion—"

And similar language as I had already read, and then:

(Reading (B) That any such additional loan shall be made by Credit Corporation and underwritten by Homes Division only after (1) Homes Division has requested Credit Corporation in writing to make such loan as a financial risk in the regular course of its business, (2) Credit Corporation has determined that such loan may not be made as a financial risk in the regular course of its business, (3) Credit Corporation has advised Homes Division of such determination in writing, setting forth the reasons for such determination and all such data and information as may be pertinent to a determination that such loan might be made as a commercial risk, in-

(Vol. VIII, p. 102)

cluding proposed terms and conditions of such loan as a commercial risk and (4) Homes Division has directed Credit Corporation in writing to proceed to make such

loan as a commercial risk in reliance upon the underwriting of such loan by Homes Division as above set forth; provided, however, that the procedure outlined in this subparagraph shall not apply to the underwriting by Homes Division of disbursements made on loans to finance the construction of model homes pursuant to Model Home program approved by the parties hereto on June 8, 1961 as such program has been or may be amended or modified."

This was signed by W. H. Lang, President, U. S. Steel Homes Credit Corporation and D. H. Boyd, President of United States Steel Homes Division, United States Steel Corporation, and attached to that is a document entitled "Loans Guaranteed by United States Steel Homes Division as of March 30, 1962."

(Vol. VIII, p. 103)

This reads:

"This schedule entitled 'Loans Guaranteed by United States Steel Homes Division as of March 30, 1962' is the schedule referred to in that certain underwriting agreements dated March 30, 1962 by and between United States Steel Homes Credit Corporation and United States Steel Homes Division, United States Steel Corporation, and is an attachment to such underwriting agreement."

This lists then two pages, plus three on the last page of various loans that have been—that are subjects of the underwriting agreement and these include

(Reading) "10-28-60, Fortner Enterprises Incorporated, Loan No. 1568, in the original amount of $88,000; 1-28-60, Fortner Enterprises Incorporated, Loan No. 1568, in the amount of $231,920."

And then, down the page farther it has:

(Reading) "8-2-61, Fortner Enterprises Incorporated, Loan 1602, amount

(Vol. VIII, p. 104)

$59,000."

We offer that in evidence, Your Honor, as Plaintiff's Exhibit No. 237.

By the Court: All right; let it be filed.

(Whereupon Plaintiff's Exhibit No. 237 Was Received in Evidence.)

Mr. Anderson: Now, if the Court please, I would like to read from Plaintiff's Exhibit No. 2, which is the request for admissions to the United States Steel Homes Credit Corporation, Paragraph No. 1:

(Reading) "The Document C-23 is a one page memorandum from W. H. Lang, of the Credit Corporation, to R. C. Dyas of the Credit Corporation, dated January 12, 1960, and that said document was prepared and maintained in the regular course of business by the U. S. Steel Homes Credit Corporation."

That document, from Mr. Lang to Mr. Dyas is headed:

(Reading) "Fortner Enterprises, Louis-

(Vol. VIII, p. 105)

ville, Kentucky, January 12, 1960.

The Fortner loan on the new basis is an extreme. Once again, we have all the money in before many houses are built and we then are dependent upon (A) the sales market which exists; (B) the ability of the customer to make a satisfactory return and so forth. This means that to the best of our ability, we should try to find out as many facts as possible. Is the product which we intend erecting there competitive,

comparable, reasonable, desirable for the area? Does a sales market exist in this price range? Are business conditions such that there probably are enough qualified buyers?

With regard to (B) above, we should know, if possible, or at least have confidence that the dealer can

(Vol. VIII, p. 106)

make a satisfactory from the use of our product. With all our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen, and perhaps we have it at Broyhill, is an unsuccessful development. This precludes, in most cases, any other house sales in that area because the one we have there has been unsuccessful."

That is marked as Plaintiff's Exhibit B-23 and we offer that into evidence.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit C-23, was Received in Evidence.)

(Vol. VIII, p. 107)

Mr. Anderson: The next is Paragraph 15 of the request for admissions;

(Reading) 'That Document C-21 is a one page memorandum from R. C. Dyas of the Credit Corporation to W. H. Lang of the Credit Corporation dated March 3, 1960; that a copy of said document was delivered to David H. Boyd of the Homes Division and that said document was prepared and maintained in the regular course of business by the Credit Corporation."

That document reads as follows:

(Reading) "I have discussed the subject application by telephone with Mr. Boyd pointing out the possibility that the dealer's lack of experience in the use of our product might result in a failure of this project and the eventual acquisition of the project real estate by the Credit Corporation.

Mr. Boyd expressed this willing-

(Vol. VIII, p. 108)

ness to assure the Credit Corporation that in the event the project real estate should be so acquired, the Homes Division would take immediate action to place the property into production, either through activity by the Construction Department or some other dealer in the area, or a combination of both.

Mr. Boyd understands that maturity of the loan must be sufficiently extended to provide for a two year building program."

This has a carbon copy to D. H. Boyd and we offer that in evidence, Your Honor and we would like to point out that it is—that Plaintiff's Exhibit No. 45 which has already been filed is a blow-up of this particular document.

By the Court: All right; let it be filed.

(Whereupon Plaintiff's Exhibit C-21 Was Received in Evidence.)

Mr. Anderson: Next, Paragraph of the request for admissions;

(Vol. VIII, p. 109)

(Reading) "That Document C-24 is a one page memorandum from Harry R. Black of the Homes Division to W. L. Rollins of the Credit Corporation dated September 22, 1960 and that said document was delivered

to and received by the Credit Corporation and that it has been maintained by it in the regular course of business."

This document reads:

(Reading) "Dear Bill: Attached is a resubmission of the original request on behalf of Fortner Enterprises, Louisville, Kentucky. I believe the attached memorandum by Mr. Day and the letter by Mr. Fortner clearly explains the situation as of this date.

Although this was in the category of special financing I have mentioned it to Mr. Boyd and whereas we are simply requesting a reactivation of an original commitment by the Cre-

(Vol. VIII, p. 110)

dit Corporation which has been recommended by Mr. Boyd and others concerned, it is hoped that the Credit Corporation is in a position to make a direct contract.

Maybe the time element in this program has worked in our favor since we now have commitments in hand covering the thirty-one lots in question and if the financial situation can be consummated this would appear to be our fastest entry into the fall market in Louisville and possibly winter and spring building.

I realize that you desire to have Dick review this program with you once again and if it is possible we hope this can be accomplished during the week of September 26th. I will be in New Albany on September 28th and 29th and if I can be of any help I will be happy to meet with you and Dick and Fortner, if necessary.

(Vol. VIII, p. 111)

Thanks for your consideration in this matter."

Next, Paragraph 3 of the request for admissions:

(Reading) "That Document C-25 is a two page memorandum from Neal Day of the Homes Division to Harry R. Black of the Homes Division dated September 19, 1960; that said document was and is an attachment to Document C-24; that it was delivered to and received by the Credit Corporation and has been maintained by it in the regular course of business."

Then, this is the memorandum dated September 19, 1960, and I believe I had already read the duplicate of this taken from the Homes Division file. I am not positive, but in any event I will not read it all, but only a portion:

(Reading) "Therefore, in a pursuant meeting with Mr. Fortner, he has stated that it is his desire to re-

(Vol. VIII, p. 112)

instate the original request and agreement and if approved proceed at once on construction of models and opening of a sales program.

You will recall that there are thirty-one lots completely developed and ready to use, with one hundred fifty-five to be developed. It is strongly felt that the thirty-one homes can be sold and shipped in 1960, with the one hundred fifty-five for a 1961 program. This still will give us our fastest entry into the Louisville market this year.

I have met and discussed this program with Mr. Fortner on several occasions and am convinced of his ability, enthusiasm and sincerity. He has the building organization, sales and promotion people, and financing know-how to make this program successful. I respectfully request

(Vol. VIII, p. 113)

your earliest consideration of his request and your recommendations to the Credit Corporation."

That is signed by Neal G. Day, Manager of Field Sales.

We offer that as Plaintiff's Exhibit C-25, Your Honor, and the preceding one as Plaintiff's Exhibit C-24.

By the Court: All right; let it be filed.

(Whereupon Plaintiff's Exhibit Nos. C-24 and 25 Were Received in Evidence.)

By the Court: I think if it is satisfactory now we will adjourn for the day and read the others at some other time into the record. Ladies and gentlemen, Mr. Black of the Homes Division who has been seated with Mr. Reutlinger throughout the trial unfortunately has had a matter arise that requires his absence on Monday, Tuesday and Wednesday and I have excused him from attendance at that time and you are not to attach any significance to the fact that Mr. Black will be absent next Monday, Tuesday and Wednesday and

(Vol. VIII, p. 114)

you are not to consider it any lack of interest on his part nor are you to consider it any failure of his to vigorously assert his defenses in this lawsuit. It is just a situation that has arisen that requires his absence and I have excused him.

Now then, I would like to see Counsel in chambers for just a moment. Ladies and gentlemen of the jury, remember the admonitions of the Court and do not discuss this matter among yourselves or with any other person and do not allow it to be discussed in your presence, sight or hearing and to be in your seats at 9:30 on Monday morning.

(Whereupon at About the Hour of 1:47 P.M., an Adjournment Was Taken, to Reconvene on Monday, June 15, 1970 at 9:30 A.M.)

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TRANSCRIPT OF TESTIMONY

VOLUME IX

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Monday, June 15, 1970.

• • • • • • • •

(Vol. IX, p. 28)

(Whereupon, at this point Mr. Kenneth L. Anderson, Esq., resumed the witness chair and the following proceedings occurred.)

Mr. Anderson: We have got a lot of reading to do, so I am going to do some; first, I would like to read Paragraph 4 of the Request for Admissions to the Credit Corporation:

(Reading) "That Document C-7 is a one-page memorandum from Harry R. Black of the Homes Division to

(Vol. IX, p. 29)

David H. Boyd and Homes Division dated January 5, 1961; that said document was delivered and received by the Credit Corporation and has been maintained by it in the regular course of business."

This is the memorandum from Mr. Black, uh, Vice-President of Sales to David H. Boyd, President:

(Reading) "The attached request for Fortner Enterprises should allow us to achieve additional shipments into the Louisville area during this construction season. Mr. Day's report is complete and provides adequate information for our consideration.

"The loan request is actually to pay off a mortgage on the improved lots and to acquire additional working capital as needed by the Fortner Corporation.

Colloquy

"As I have informed you in the past, Fortner Enterprises expended large amounts of money in advertising and promoting the project. As a matter

(Vol. IX, p. 30)

of fact, they did one of the outstanding promotional jobs that I have seen in the past year. The market in the Louisville area has responded well to this promotion and although due to delays which were encountered due to bad weather, the program is now rolling and we have accomplished in excess of forty sales to date.

"The loan on the improved lots it represents would not only assist him in his capital requirements, but should provide additional needed funds. Because of the improved condition of the lots it is the recommendation of the Sales Department that the Credit Corporation meet with the principals of Fortner Enterprises, Incorporated, and negotiate this request."

That is Plaintiff's Exhibit C-7, which we would offer into evidence.

By the Court: Let it be filed.

(Vol. IX, p. 31)

(Whereupon, Plaintiff's Exhibit C-7 was received in evidence.)

Mr. Anderson: Paragraph 5 of the Request for Admissions:

(Reading) "That Document C-6 is a two-page memorandum from Neal G. Day of the Homes Division to Harry R. Black of the Homes Division, dated May 29, 1961; that it was and is an attachment to Document C-7; that it was delivered to and received by the Credit Corporation and that said document has been maintained by it in the regular course of business."

Now, I am just going to read a portion—I believe I may have read this; I'm not positive. I am just going to read a portion of this document, C-7:

(Reading) "The F.H.A. valuation on the lots is averaging $2,200.00. Mr. Fortner suggested that as a release value which is the same as the previous existing agreement, this would pay off the loan in twenty-four-plus lot releases. These lots are ready for use.

(Vol. IX, p. 32)

"Six sales have been made, two of which will apply to the requested loan. This program would give us a very definite added commercial advantage in this market.

"I therefore recommend approval of this request and respectfully urge your usual expeditious handling and further recommendations to the Credit Corporation."

That is Plaintiff's Exhibit C-6, which I would offer into evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit C-6 was received in evidence.)

Mr. Anderson: Next, I will read Paragraph 7 of the Request for Admissions:

(Reading) "That Document C-12 is a one-page letter from David H. Boyd of the Homes Division to R. C. Dyas of the Credit Corporation, dated June 13, 1961; that said document

(Vol. IX, p. 33)

was delivered to and received by the Credit Corporation and has been maintained by it in the regular course of business; that Document C-11 is a memorandum attached to Document C-12 from R. C. Dyas of the Credit Corporation to W. H. Lang of the Credit Corporation, dated June 16, 1961, and that said document was prepared and maintained in the regular course of business by the Credit Corporation; that Document C-8 is a copy of the Document C-12; that said copy was delivered to the New Albany office of the Credit Corporation and maintained by it in the regular course of business."

Now, the Document C-12 is the letter from Mr. Boyd of the Homes Division to Mr. Dyas, Vice-President and General Manager of the Credit Corporation:

(Reading) "Dear Dick;

"Under date of June 5th, Harry Black forwarded to me with copy for Bill Rollins, memorandum concerning

(Vol. IX, p. 34)

Fortner Enterprises, Incorporation. It was the intention of the Sales Department to consider the contents of that memorandum as a request for special financing.

"In a sense, it is, but I believe it relates largely to the existing financing situation with this dealer and it may well be that a discussion with Mr. Fortner prior to processing any formalized request in this case would be in order.

"Indications thus far are that Mr. Fortner has done a better than satisfactory job of introducing U. S. Steel Homes Products in his Louisville subdivision.

"It is apparent that he has spent considerable time, effort and money in promotional activity, but he does not yet have sufficient houses built and closed to provide for a normal turnover of money to meet the costs which he has thus far incurred.

Colloquy

(Vol. IX, p. 35)

"I would appreciate it if you would review the problem yourself. Very truly yours."

Then, the memorandum Document C-11, which was attached thereto, and this is dated June 16, 1961, reads as follows:

(Reading) "This is a letter I mentioned to you. Dyas' theory seems to be that this simply represents a need by him for working capital to carry out his existing program and therefore does not represent a request under the special program."

Now, I would offer Plaintiff's Exhibits C-11 and C-12 into evidence and also C-8 which I have previously read.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit Nos. C-11, C-12 and C-8 were received into evidence.)

Mr. Anderson: Paragraph 9 of the Request for Admissions reads:

(Vol. IX, p. 36)

(Reading) "That Document C-10 is a one-page letter from W. L. Rollins of the Credit Corporation to R. C. Dyas of the Credit Corporation, dated June 26, 1961, and that said document was prepared and maintained in the regular course of business by the Credit Corporation; that Document C-14 is a four-page memorandum from W. L. Rollins to R. C. Dyas, dated June 26, 1961; that said document was an enclosure with or attachment to Document C-10 and that said document was prepared and maintained in the regular course of business by the Credit Corporation; that both Documents C-10 and C-14 were delivered to David H. Boyd and Harry R. Black of the Homes Division."

Colloquy

Now, Document C-10 reads as follows, and is from Mr. Rollins to Mr. Dyas;

(Reading) "Dear Mr. Dyas;

"Reference is made to Mr. Boyd's letter addressed to you under date of

(Vol. IX, p. 37)

June 13, 1961, relative to the request submitted by the subject dealer for financing on approximately thirty-two lots in the Golden Meadows Subdivision in which letter it was requested that the Credit Corporation review with Mr. Fortner his problem prior to any formalized processing of the case.

"On June 20, 1961, accompanied by Mr. Grayson of the Homes Division and Mr. Leonard of the Credit Corporation I met with Mr. Fortner on this matter and attached is a memorandum regarding his request. There can be no question that the dealer has incurred substantial expenditures, of which he has been unable to recover any portion to date.

"After discussing the matter with Mr. Fortner I can only conclude that the loan on any basis other than that which he has asked for would be unacceptable to him. I am forwarding copies of this letter and enclosure

(Vol. IX, p. 38)

to Mr. Boyd and Mr. Black so they will be in a position to discuss the case with you."

The memorandum which is attached is rather long and I find that I have read this document previously, I believe as a part of the United States Steel documents which I have read earlier. So, I won't burden you with reading it again.

I do offer these into evidence, Your Honor.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. C-10 and C-14 were received in Evidence.)

Mr. Anderson: Paragraph 10 of the Request for Admissions reads:

(Reading) "That Document C-9 is a two-page letter from David H. Boyd of the Homes Division to W. H. Lang of the Credit Corporation, dated June 29, 1961, and that said letter was delivered and received by the Credit Corporation and maintained by it in the regular course of business."

(Vol. IX, p. 39)

Again, I have read this document to you previously from the records of the United States Steel Homes Division records and therefore I will not read it again, but I do offer it into evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit C-9 was received in evidence.)

Mr. Anderson: I would like now to read Paragraph 12 of the Request for Admissions to the Credit Corporation:

(Reading) "That Document C-17 is a two-page memorandum from R. C. Dyas of the Credit Corporation to W. H. Lang of the Credit Corporation, dated July 16, 1961, and that said document was prepared and maintained in the regular course of business by the Credit Corporation."

This memorandum from Mr. Dyas to Mr. Lang dated July 6, 1961, on Fortner Enterprises, Incorporated, Louisville, Kentucky, chronology of loan request is as follows:

(Reading) "June 5th, Rollins receives

(Vol. IX, p. 40)

copy of the loan request dated May 20th. Memo dated

May 20, made in May to Black and reply dated June 5th from Black to Boyd endorsing request under special program.

"Copies of such memos are furnished Credit Corporation for advance information. only. No action is taken until Boyd formally endorses for Homes Division.

"June 9th, Rollins and Dyas confer with Boyd and Black in Boyd's office, New Albany, and present objections to loan. Boyd and Black emphasize commercial importance and ask that we confer with Fortner to see if anything can be worked out.

"June 13th, Boyd forwards letter to Dyas which does not endorse request, but reiterates desire for Credit Corporation to meet with Fortner and review the problem with him. Rollins makes appointment to meet with Fortner on Saturday, June 17, which is the

(Vol. IX, p. 41)

earliest available for Fortner, and at Fortner's request this is subsequently postponed to June 20th.

"June 16th, Dyas discusses with Lang who counsels cooperative approach (see file).

"June 20th, Rollins meets with Fortner and develops information contained in his report of June 26th. Preparation of report is delayed while Fortner prepares and furnishes balance sheet attached as exhibit.

"June 28th. Dyas receives Rollins' report and discusses same with Black who also has copy. Black says he will talk with Boyd and call back.

"June 30th, Dyas advised Lang on status.

"July 5th, Black calls Dyas and advises Homes Division endorses request. Meanwhile, letter from

Boyd to Lang, dated June 29th, asking that further negotiations be conducted. While a

(Vol. IX, p. 42)

solid month has transpired since we first heard of this request, we have lost no time whatever in cooperating with Homes and the dealer, meanwhile handling the other work of the Credit Corporation. There can be no criticism by anyone on this score.

"If the overall impression is one of inefficiency, this is readily admitted in behalf of all concerned. It is the same inefficiency which results from any group of two or more cooks brewing the same broth, or a football team without a quarterback. Sometimes there is a wide gap between the ideals of a town meeting and its accomplishments.

"The lack of common understanding between Homes and Credit is easily explained. One is interest almost exclusively in shipments; the other in applying some semblance of business judgment in loan transactions which actually are no more than speculations

(Vol. IX, p. 43)

on the promotional capabilities of opportunists called home builders.

"How this common understanding can be improved without formal exchanges and informal conversations —both of which you say you dislike—is beyond my comprehension. There has been no lack of working together in this case. There is simply a difference of opinion, and somebody has to make a decision, Meanwhile, the dealer is waiting.

"As I advised you the other day, I have discussed with Black the idea of joint meetings between Homes and Credit in New Albany once a week or every two weeks if it will help to improve the common understanding of which you speak. It probably would result only in loading more of Homes' responsibilities on our shoulders, without reciprocal authority, but I am willing to try."

That is Plaintiff's Exhibit C-17 and we would offer that in evidence, Your Honor.

(Vol. IX, p. 44)

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit C-17 was received in evidence.)

Mr. Anderson: Next, we have Paragraph 13 of the Request for Admissions:

(Reading) "That Document C-18 is a one-page memorandum. Prepared by R. C. Dyas of the Credit Corporation, dated May 15, 1962, and that said document was prepared and maintained in the regular course of business by the Credit Corporation."

This document, dated May 15, 1962, is headed:

(Reading) "Re: Fortner Enterprises, Incorporated, Louisville, Kentucky, loan status as of 4-30-62

"Date of loan, 10-28-60, Loan No. 1568, Loan Type, A&D, acquisition and development; original amount, $88,000.00; remaining commitment, zero; unpaid balance, zero; maturity date, blank.

"Second portion of Loan No. 1568,

(Vol. IX, p. 45)

construction, $373,200.00; remaining commitment, $78,631.00; unpaid balance, $28,980.00; maturity date, 6-1-62.

"Third portion of Loan 1568, Acquisition and Development, $231,920.00; remaining commitment, $30,-902.00; unpaid balance, $200,757.00; maturity date, 12-31-62.

"Fourth portion of Loan No. 1568, Construction, $1,362,180.00; remaining commitment, $1,235,436.00; unpaid balance, $105,784.00; maturity date, 12-31-62.

"Second transaction, date of loan, 8-2-61. First portion of that as listed, Loan No. 1602, Acquisition, $59,000.00; remaining commitment, zero; unpaid balance, $52,400.00; maturity date, 12-31-62.

"Second portion of Loan No. 1602, Construction; original amount, $403,400.00; remaining commitment, $379,641.00; unpaid balance, zero; maturity date, 12-31-62.

(Vol. IX, p. 46)

"Loan No. 1568 originally was secured by first mortgage on one hundred eighty-six lots, with release values sufficient to retire the two land notes over one hundred forty-six lots. Loan No. 1602 is secured by first mortgage on thirty-two lots with release values sufficient to retire the land note over twenty-five lots.

"Shipments; sixty-seven shipments have been made. Release values paid to date have been sufficient to retire the $88,000.00 land note under Loan No. 1568."

Now, that has typed at the bottom, R. C. Dyas and is dated May 15, 1962.

That is Plaintiff's Exhibit No. C-18 and we would offer it in evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. C-18 was received in evidence.)

Mr. Anderson: Now, Paragraph 14 of the Request for Admissions:

(Vol. IX, p. 47)

(Reading) "That Document C-20 is a one-page letter from A. Scott Hamilton, Jr., counsel for Fortner Enterprises, Incorporated, to David H. Boyd, President of the Homes Division, dated May 11, 1962; that said letter was delivered to and received by the Homes Division; that a copy of said letter was delivered to and received by the Credit Corporation and that said document has been maintained in the regular course of business by the Credit Corporation; that Document C-19 is a note attached to Document C-20 with the typewritten portion being from R. C. Dyas of the Credit Corporation to W. H. Lang of the Credit Corporation, dated May 11, 1962, and with the handwritten portion being a note prepared by W. H. Lang, President of the Credit Corporation, and that said notes were prepared and maintained in the regular course of

(Vol. IX, p. 48)

business by the Credit Corporation."

First, I will read Mr. Hamilton's letter addressed to the United States Steel Homes Division, United States Steel Corporation, attention Mr. D. H. Boyd, President:

(Reading) "Gentlemen:

"On or about October 28, 1960, Fortner Enterprises, Incorporated, entered into a formal arrangement with the United States Steel Homes Credit Corporation whereby it was agreed that the United States Steel Homes Credit Corporation would extend credit to Fortner Enterprises under condition that Fortner Enterprises construct homes in Golden Meadows Subdivision out of component parts manufactured and furnished by the United States Steel Homes Division of United States Steel Corporation.

"Since the inception of this contract Fortner Enterprises have in good faith constructed homes of these components in Golden Meadows

(Vol. IX, p. 49)

Subdivision and expended large sums of money in a diligent effort to bring about the sale of these units. However, it is very apparent that many of the components furnished by the United States Steel Homes Division are inferior and of a sub-quality and no amount of care or promotion by Fortner Enterprises has been able to overcome these serious shortcomings.

"Therefore, it is incumbent that arrangements be made to compensate Fortner Enterprises for the damage it has sustained in the past and can reasonably expect to sustain in the future due to these defective products which have in turn greatly damaged the reputation of Golden Meadows Subdivision.

"Would you please have your representative contact this office no later than one week from the date of this letter in order that we may avoid the necessity of costly

(Vol. IX, p. 50)

litigation. Sincerely yours,"

And that is signed by Mr. Hamilton. Now, the memorandum attached, which is typewritten, is dated May 11, 1962, and is from Mr. Dyas of the Credit Corporation to Mr. Lang, President of the Credit Corporation and reads:

(Reading) "Bill Rollins has just received a copy of this letter today. Thought you should be advised immediately."

Now, the handwritten portion prepared by W. H. Lang, President of the corporation reads:

(Reading) "Boyd—discussed today—"

Now, I have forgotten and we established at one point what the next phrase is and I have forgotten. Well, the next portion I can't read, but then:

(Reading) "R. C. D. will try to see if can't keep on oral basis instead of allowing written points to become issues."

These are Plaintiff's Exhibit C-19 and C-20 and we offer them in evidence, Your Honor.

By the Court: Let them be

(Vol. IX, p. 51)

filed.

(Whereupon, Plaintiff's Exhibit Nos. C-19 and C-20 were received in evidence.)

By the Court: Gentlemen, let's take about ten minutes.

(Whereupon, at about the hour of 10:30 A.M., a short recess was had, reconvening at about the hour of 10:45 A.M., and the following proceedings occurred.)

* * * * * *

Mr. Anderson: Next, I would like to read Paragraph 16 of the Request for Admissions to the Credit Corporation:

(Reading) "That the attached financial statements of U. S. Steel Homes Credit Corporation dated December 31, 1961, and December 31, 1962, are true and accurate copies of the financial statements of the

(Vol. IX, p. 52)

U. S. Steel Homes Credit Corporation as prepared by Price Waterhouse & Company and that the information contained therein is true and accurate and that said financial statements have been maintained by the Credit Corporation in the regular course of business."

The financial statements, first of all, the first one is dated—well, there is a forwarding letter with the first one dated February 27, 1962, from Price Waterhouse & Company and it is addressed to the Board of Directors of the

United States Steel Homes Credit Corporation and this forwarding letter says:

(Reading) "In our opinion, the accompanying financial statements present fairly the financial position of the U. S. Steel Homes Credit Corporation at December 31, 1961, and the results of its operations for the year, in conformity with generally accepted accounting principles applied on a basis consistent with that of the

(Vol. IX, p. 53)

preceding year. Our examination of these statements were made in accordance with generally accepted auditing standards and accordingly included such items of the accounting records and such other auditing procedures as we consider it necessary in the circumstances."

First, following that then is a balance sheet for United States Steel Homes Credit Corporation and it has information on there as of December 31, 1960, and December 31, 1961, both years under the asset portion, they show:

(Reading) "Construction loans to builders, secured by mortgages, as of December 31, 1960, $4,817,911.00, and for the year 1961, $3,669,305.00." Then, it says: (Reading) "Land development and financing loans, secured by mortgages, year 1960, $5,371,955.00; for the year 1961, $5,917,748.00."

Now, this document goes on to show the capital stock and accumulated—capital stock

(Vol. IX, p. 54)

authorized, one hundred thousand shares at December 31, 1961, and fifty thousand shares at December 31, 1960, $100.00 par value.

Issued and outstanding, ten thousand shares, and then under "Notes to financial statements", the following appears:

(Reading) "The corporation's parent company has agreed that upon request, it will purchase an additional ninety thousand shares of the corporation's capital stock at par and lend the corporation an additional $29,000,000.00, such loan to be subordinated to bank loans."

Now then, the second financial statement for the year ending December 31, 1962, has the same type forwarding letter as I read in the preceding one so I won't read it again and it has the breakdown between the two years on it on the balance sheet, but since I've already read the 1961 I will just read the 1962 from this document:

(Reading) "Construction loans to builders, secured by mortgages, $4,883,205.00. Land development

(Vol. IX, p. 55)

and financial loans, secured by mortgages, $7,082,-092.00."

The notes to financial statements on this financial balance sheet then read:

(Reading) "The corporation's parent company has agreed that upon request it will purchase an additional ninety thousand shares of the corporation's capital stock at par and lend the corporation an additional $26,000,000.00, such loan to be subordinated to Bank loans."

Next, I will read Paragraph 17 of the Request for Admissions:

(Reading) "That the documents attached hereto following and attached to the Certificate of V. L. Raw-

lins, Secretary of the United States Steel Homes Credit Corporation, dated April 23, 1964, are true and correct copies of minutes included in the minutes of the Executive Committee and Board of Directors of U. S. Steel Homes Credit Corporation and that the copies of

(Vol. IX, p. 56)

the Certificate of Incorporation and Amendment thereto, and of the by-laws of the U. S. Steel Homes Credit Corporation are true and correct copies of said documents and that all said documents were prepared and maintained by U. S. Steel Homes Credit Corporation in the regular course of business."

Mr. Rawlins, who is Secretary of the Credit Corporation, has made a certificate here which was referred to dated April 23, 1964, and it says:

(Reading) "I hereby certify that the attached documents contain true and correct copies of minutes included in the minutes of the Executive Committee and Board of Directors of U. S. Steel Homes Credit Corporation and that the copies of the Certificate of Incorporation and Amendment thereto and of the by-laws of U. S. Steel Homes Credit Corporation are true and correct copies of said documents."

Now, I would then like to read from the

(Vol. IX, p. 57)

U. S. Steel Homes Credit Corporation Directors meeting minutes dated December 16, 1958:

(Reading) "A report was made on the financial position of the corporation and on its loan and mortgage transactions.

"Also, there was presented a report on proposed operations in 1959 of United States Steel Homes Division of United States Steel Corporation and a proposed

program of certain financial transactions by this corporation in connection with those operations was outlined.

"After discussion, on motion, duly seconded, the following resolution was unanimously adopted;

"Resolved that, for the purposes of enabling the United States Steel Homes Division of United States Steel Corporation, (1) To attain a minimum distribution of one thousand eight hundred units in 1959, and such additional distribution as may be

(Vol. IX, p. 58)

feasible, and (2) To enlist and maintain the support of and assistance of selected dealers in the development and testing of steel components, and when specially requested by the Homes Division, (A) This corporation, in instances in which its present programs of loans, mortgage commitment insurance, and mortgage commitment procurement prove inadequate to effectuate the above purposes, extend the following financial assistance to dealers in addition to its present program.

"(1) Make loans to or for the benefit of dealers or to enter into other forms of transactions designed directly to effectuate the above purposes, without conformity with conventional or conservative patterns, but within the bounds of prudent business judgment;

"(B) That the United States Steel Homes Division underwrite and guarantee all loss incurred in the liquidation of

(Vol. IX, p. 59)

mortgages acquired under any commitments providing fixed discount expense, to the extent which loan may exceed the loss which would have been incurred if the commitments had provided fixed discount expense cor-

responding with that fixed generally by institutional issuers of stand-by commitments, as determined by the Credit Corporation at the time of issuance of the commitment;

"And the officers of this corporation be, and hereby they are, authorized to enter into transactions comprehended within this resolution."

Next, from the Certificate of Incorporation of United States Steel Homes Credit Corporation I would like to read just a couple of pertinent portions:

(Reading) "We, the undersigned, in order to form a corporation for the purposes hereinafter stated under and pursuant to the provisions of the General Corporation Law of the State of Delaware, do hereby certify as follows:

(Vol. IX, p. 60)

"First, the name of the corporation is U. S. Steel Homes Credit Corporation.

"Second, the principal office of the corporation in the State of Delaware is located at No. 100 West 10th Street in the City of Wilmington, 99, County of New Castle. The name of its resident agent is The Corporation Trust Company, whose address is No. 100 West 10th Street in said City of Wilmington.

"Third, the purposes for which the Corporation is to be formed are to do any and all things hereinafter set forth to the same extent as natural persons might do or could do in any part of the world, namely:

"(1) To engage in the real estate mortgage loan business either as a principal, agent or broker, within or without the State of Delaware, including, but not by way of limitation the power to negotiate loans whether or not guaranteed by Governmental agencies

(Vol. IX, p. 61)

or other persons, firms, partnerships, corporations or associations on real estate and on personal property appurtenant thereto and the power to lend money on notes, bonds or other evidences of indebtedness secured by mortgages, trust deeds or building loan agreements on real estate together with the personal property appurtenant thereto, wherever situated, and in connection therewith to purchase or otherwise acquire, buy, take, hold, own, transfer, exchange, sell, assign, convey, pledge, endorse, negotiate, guarantee or otherwise deal in, make advances on or dispose of promissory notes, bonds, obligations, real estate mortgages, and so forth—"

And:

(Reading) "To make advances or loans with or without security to the extent permitted by law."

Those are the portions of the purposes which I wished to read. If the Court please, we would offer

(Vol. IX, p. 62)

into evidence all of the attachments to Plaintiff's Exhibit No. 2, which is the Request for Admissions to U. S. Steel Homes Credit Corporation which includes the various minutes and Articles of Incorporation, Amendments and By-Laws and whatever other documents and financial statements, all of which are physically attached to this exhibit.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 2 with attachments was received in evidence.)

Mr. Anderson: Now, I will go back to the Homes Division again. Well, I'm sorry; I'm not ready to go back to the Homes Division. I forgot to read some more of

the Credit Corporation Request for Admissions and this is again for the record and I am reading from Paragraph 18 of the Request for Admissions to U. S. Steel Homes Credit Corporation and this paragraph reads as follows:

(Reading) "That Document 132, attached hereto, was prepared by R. C. Dyas, Vice-President of the Credit Corporation, and addressed to W. H. Lang, President

(Vol. IX, p. 63)

of the Credit Corporation, on or about June 8, 1962, and that a copy of said memorandum was delivered to David H. Boyd, President of the Homes Division."

Document 132 reads as follows, and is from R. C. Dyas to W. H. Lang, dated June 8, 1962, with a subject of Fortner Enterprises, Incorporated, Louisville, Kentucky:

(Reading) "At the request of the Homes Division on June 5th, Mr. Rollins and I participated in a meeting in Louisville with representatives of the Homes Division and the subject dealership to discuss damages claims referred to in letter dated May 10th, from the dealer's attorneys.

"Status of loans; at May 31st, the status of Credit Corporation loans to this dealership was as follows:"

Now, they again give the amount of the loans and there is only one portion of this that I will, to save time, uh, that I want to read, and this document is set up and first there is the loan number given of

(Vol. IX, p. 64)

1568 under Acquisition, which says "type" and under that it has "A&D", Acquisition and Development and next to that it has the amount of $231,920.00. Then, it has undispersed and as to that particular portion of the loan it has $30,902.00 and shows a balance on that particular portion of the loan of $191,958.00.

(Reading) "Acquisition and Development loans, No. 1568, originally were secured by one hundred eighty-six lots of which thirty-one (Developed) were contributed to the dealership by A. B. Fortner—one hundred percent owner of the dealership—and one hundred fifty-five (Undeveloped) were purchased from Iroquois Development Company, in which Mr. Fortner owned a fifty percent interest. The one hundred fifty-five lots purchased with loan proceeds at $170,500.00, which represented a reasonable value of $1,100.00 per lot, but an undoubted profit to Iroquois. The thirty-one developed lots contributed by Fortner were valued at $62,000.00. The transaction provided Fortner a net

(Vol. IX, p. 65)

liquidation of investment plus a profit.

"Acquisition Loan No. 1602 originally was secured by thirty-two developed lots, which were purchased from Iroquois with the loan proceeds. Iroquois at that time had become one hundred percent owned by Fortner. The purchase price was applied to retirement of a $24,000.00 mortgage and the balance to reimburse Fortner for working capital injected in the subject dealership.

"These loans are guaranteed by the Homes Division pursuant to Underwriting agreement dated March 30, 1962. Shipments to date are reported at sixty-seven.

"Background. Acquisition and Development Loans No. 1568 were closed on October 28, 1960. At the time of closing Acquisition Loan No. 1602 in August, 1961, the dealership had taken some thirty-five shipments, and voiced some complaints regarding service and

(Vol. IX, p. 66)

quality. These were relayed to the Homes Division and subsequently we were advised that satisfactory adjustments had been made.

"Last month we received copy of letter dated May 10, addressed to the Homes Division by the Louisville law firm of Hamilton, Hopson & Hamilton, as attorneys for the dealership, alleging damages for inferior and subquality components. Prior to our meeting on June 5th, representatives of the Homes Division and A. L. Reutlinger, local counsel, had met with the dealer and his attorneys in an unsuccessful effort to obtain a specific list of claims upon which a settlement might be negotiated.

"Meeting of June 5th. At the meeting which Mr. Rollins and I attended, the dealer and his attorneys again declined to furnish a specific list of claims, stating that it is impossible to negotiate a settlement because they

(Vol. IX, p. 67)

expect many more complaints from home owners in the future. They indicated that they might waive their claims if the Credit Corporation would modify its loan agreements to permit the building of conventional houses and extend certain moratoriums on the payment of interest and principle.

"They suggested that such action by the Credit Corporation would enable them to build in the $10,000.00 price bracket, and that they would consider the use of our product if we could compete in this bracket and furnish an outright indemnity against complaints by home owners. The Homes Division advised that its product line is not designed for this bracket and in any event it would provide no such open-end indemnity.

'Mr. Rollins and I took the position that the alleged damages due to product appeared to be mere camouflage for an effort by the

(Vol. IX, p. 68)

dealer to abandon his present market and seek a new one on Credit Corporation financing and that we were not inclined to offer any concessions with respect to our loan agreements. We suggested that the dealership now should direct its efforts to refinancing our loans.

"At this point, attorneys for the dealer declared that no further purpose could be served by negotiations and that they would see us in court. Thereupon, Mr. Rollins and I left the meeting, but Messrs. Boyd, Black and Reutlinger remained. Afterward we learned that an agreement was reached for the dealership to prepare a specific list of claims and enter into negotiations for settlement with the Homes Division within a few days.

"To facilitate these negotiations, I assured Mr. Reutlinger that the Credit Corporation would withhold action to enforce payment of its loans for a maximum period of two weeks, provided

(Vol. IX, p. 69)

satisfactory progress is made in the negotiations with the Homes Division. Interest is now one month delinquent and since maturity of one of the notes on June 1, all are technically in default. The Homes Division expects to receive the list of claims not later than Monday, June 11th.

"In the course of discussions at this meeting, the dealer made several observations that he is broke, that he is going into bankruptcy, and so forth. We therefore advised him that it was necessary for us to invoke our right under the loan agreements to audit the books pertaining to this project, and immediately after the meeting engaged the firm of Ernst & Ernst to conduct such an audit. They agreed to commence the following morning.

Colloquy

"Looking forward somewhat, it does not appear reasonable to expect the liquidation of our loans through use

(Vol. IX, p. 70)

of our products by this dealership, regardless of the outcome of current negotiations. The dealer may refinance, but it is also likely that we will wind up with another project to liquidate. It is not too early for consideration to be given to the management of such an undertaking."

We offer Plaintiff's Exhibit No. 132 in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 132 was Received in Evidence.)

Mr. Anderson: I would now like to read Paragraph 19 of the Request for Admissions:

(Reading) "That the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962, are as follows; 1960,

(Vol. IX, p. 71)

sixty-eight percent; 1961, seventy percent; 1962, seventy-five percent."

I would now like to read Paragraph 20 of the Request for Admissions:

(Reading) "That for each of the years 1960 through 1962, the otal amount of loan commitments entered into by U. S. Steel Homes Credit Corporation for each state in which it entered into loan commitments during this period was as follows:"

Colloquy

I have it broken down in the Request for Admissions by state, but I just want to read the totals, Your Honor, for the respective years. Loan commitments for 1960 totaled $22,625,805.00; for 1961, $19,342,612.00; for 1962, $19,283,544.00.

Now, Paragraph 21 of the Request for Admissions reads:

(Reading) "That all loan commitments entered into in 1960, 1961 and 1962, by Credit Corporation involved loan agreements and/or mortgages which contained a provision or provisions requiring the borrower to purchase

(Vol. IX, p. 72)

and erect on the land described therein house packages manufactured and sold by the Homes Division of United States Steel Corporation so long as the loan or loans or any portion thereof remained outstanding except the following specific loans:"

And then, there are a group, again Your Honor, of a few exceptions which they have told us about which are listed here and I will just read those quickly:

(Reading) "Highland Terrace, Incorporated, as $50,000.00; Valley Hi, Incorporated, $60,000.00; Steel Homes, Incorporated, $27,000.00; Carter C. Willsey and Forest J. Stump, $135,000.00; Hoosier Villas, Incorporated, $108,000.00; Third Hoosier Villas, Incorporated, $38,000.00; Fourth Hoosier Villas, Incorporated, $45,000.00; Carter C. Willsey and Forest J. Stump, $47,000.00; Willow Dell Builders, Incorporated, $67,000.00."

By the Court: Do you have

(Vol IX, p. 73)

a total?

Mr. Anderson: I didn't add it up, Your Honor; just a second. It is $627,000.00, is what they total, Your Honor. I think that this whole Request for Admissions has already been admitted into evidence, so I don't guess I have to—

By the Court: (Interrupting) All right.

Mr. Anderson: Now, we get to the Homes Division again; Paragraph 33 of the Request for Admissions to the Homes Division reads:

(Reading) "That Document 202 is a one-page notice to all Homes Division employees dated April 3, 1962, by Harry R. Black of Homes Division and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

And, that notice reads as follows:

(Reading) "As you probably all know our dealer, Fortner Enterprises, Louisville, Kentucky, is exhibiting one of our homes at the Loiusville Home Show.

(Vol. IX, p. 74)

"The show, currently in progress, will run through April 8th and is being held at the Kentucky Fair & Exposition Center.

"The Sales Department feels that it would be most advantageous for employees of the Homes Division, if possible, to attend this Home Show. It would also be helpful, customer-relationwise, if you do visit the exhibit, to make yourself known to the employees of Mr. Fortner who are manning the model home.

"Although we are participating in a small way with Mr. Fortner in this promotion, the majority of the expense and effort has been on his own initiative and will be extremely beneficial in promoting our homes in the Louisville area."

That is Plaintiff's Exhibit No. 202, Your Honor, and we offer that in evidence.

By the Court: All right; let it be filed.

(Vol. IX, p. 75)

(Whereupon, Plaintiff's Exhibit No. 202 was received in evidence.)

Mr. Anderson: Next, Paragraph 34 of the Request for Admissions reads:

(Reading) "That Document 200 is a two-page memorandum from E. L. Akers, Jr., of Homes Division to Harry R. Black of Homes Division, dated May 24, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

That reads:

(Reading) "Subject Fortner's miscellaneous shipments and credits.

"Listed below is a brief summary of material shipments in addition to home packages and credits for Fortner Enterprises, Incorporated, and covers 1961 and 1962 to date. Please be advised that the figures shown below may not be exact since there are many small items on which pricing is not available at this writing.

(Vol. IX, p. 76)

"One, miscellaneous materials ordered by dealer in addition to original home order, $4,894.00.

"Two, miscellaneous materials shipped by United States Steel Homes Division to correct United States Steel Homes Division's errors and charged dealer pending return of materials for credit—see below—$1,656.00.

"Total charges to dealer, $6,550.00.

"Miscellaneous materials shipped by United States

Steel Homes Division to dealer to correct United States Steel Homes Division's errors and not charged to dealer; shortages, $501.80, errors, $39.25; damages, $15.82; warranty, $275.13; total, $832.00.

"Materials returned to United States Steel Homes Division for credit and applied both against Section 1 and 2 above, credit, $2,188.51.

"Credit adjustments made to

(Vol. IX, p. 77)

dealer's account; advertising and materials for display use, $1,291.95.

"Credit adjustments to dealer including local purchases of material and labor expense, $619.00; total, $1,910.95.

"In addition to the above direct expenses, you are aware of the time and trips involved by our company, suppliers and dealer's personnel in attempting to correct steel folding doors, windows and drywall, plus the dealer's complaint of no reimbursement for local cost of installing kitchen counter top replacements."

This is Plaintiff's Exhibit 200 and we offer it into evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 200 was received in evidence.)

Mr. Anderson: I would like to read from Paragraph 55 of the Request for Admissions:

(Reading) "That Document 83 is a

(Vol. IX, p. 78)

one-page memorandum from M. R. Moreillon of Homes Division to Charles Schultz of Homes Division, dated June 2, 1961, and that said document was prepared

and maintained in the regular course of business by United States Steel Corporation."

Document No. 83 reads as follows, and is a handwritten memorandum:

(Reading) "Dealer, Fortner Enterprises, Louisville, Kentucky. Registered Home No. 61713. Date, 5-29-61. Erection of the above registered home was started on 5-31-61. I was on another job on that date, but got to this home before noon on 6-1-61.

"When I arrived the crew reported a mix-up in roof sheeting parts. Sheeting had been applied to the bedroom section of the home except for the two hip ridge pieces, No. BD-19U. They had not been able to locate those parts. I checked through all sheeting on the job and didn't find them either. The

(Vol. IX, p. 79)

shipping list had been mislayed so I couldn't check that.

"In checking actual parts with the roof sheeting layout print it was found that there was an actual shortage of the following pieces; (1) 2-BD-19U; (2) 2-BE-13AC pieces; (3) 1-BE-13Q piece.

"It was also found that we had one valley cut piece marked BE-13AA, another valley cut piece was plainly marked BD-19A and a third valley cut piece was plainly marked BE-13Q. I measured and checked the BE-13AA and found it to be as marked according to the roof sheeting drawing furnished by our Engineering Department. The other two (BD-19A and BE-13Q) were exact duplicates of the BE-13AA. Two BE-13AA pieces are required for the home and therefore we had one extra BE-13AA piece. I phoned the plant requesting that the pieces we were short be delivered to the job.

(Vol. IX, p. 80)

I have since checked the shipping list and find it to list sheeting parts correctly."

That is Plaintiff's Exhibit No. 83 and we offer it in evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 83 was received in evidence.)

Mr. Anderson: I will read Paragraph 51 of the Request for Admissions:

(Reading) "That Document 73 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated August 14, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

That document reads:

(Reading) "August 14, 1961, from M. R. Moreillen to Charles Schultz, subject defective sink tops—sixty inch. Dealer, Fortner Enterprises, Incorporated.

(Vol. IX, p. 81)

"I have inspected and found the sink tops defective in homes as follows; Registered Home No. 61731, Model B-1 crawl space, dated 5-22-61. The sink top in this home was found to be badly delaminated in the area back of the bowl. It is a 2C Top 60 ES DBCO, left hand—gray.

"Registered Home No. 61818, Model B-1 slab, date, 6-10-61; the sink top in this home was found to be delaminated in the area back of the bowl. It is a 2C Top 60 DBCO, left hand—pink.

"The owner of another home that has had one top replaced recently complained to Mr. Earl Smith, who

is in charge of sales or Fortner Enterprises, in Golden Meadows, that the replacement top is also starting to go back. I inspected this top and found no delamination, but did find that there is a small crack between the top and backsplash. This crack

(Vol. IX, p. 82)

is visible but pretty small. There should be some way to fill the crack and save the top as there is no delamination now.

"Caulking used at the joint visible over much of the joint and it is possible that the owner used a kitchen knife to test the joint at the point where the crack shows.

"The above home is Registered Home No. 61613, Model B-1, right hand. Sink top is a 20 60 ES DBCO, left hand, flame.

"The first two tops should be replaced as soon as possible.

This is Plaintiff's Exhibit No. 73 and we offer it into evidence.

Now, if I could just have a minute, Your Honor. We needed—well, we corrected our copies of the Request for Admissions when we put this in, but this doesn't look like we corrected the exhibit itself. I will read from Paragraph 48 of the Request for Admissions:

(Reading) "That Document 62 is a

(Vol. IX, p. 83)

one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated August 15, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

It reads:

(Reading) "Subject, defective sink top. Dealer, Fortner Enterprises, Incorporated. Registered Home No. 61713.

"I inspected the sink top in the above registered home today and found the sink top delaminated back of the bowl at the backsplash. Sink top is a 13 B Top 92 by 83 ES DBMR, right hand, gray. It looks like a replacement must be made."

That's Plaintiff's Exhibit 62 and we offer it in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 62 was received in evidence.)

(Vol. IX, p. 84)

Mr. Anderson: Paragraph 49 of the Request for Admissions reads:

(Reading) "That Document 63 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated August 15, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is a second handwritten memorandum from Mr. Moreillen to Mr. Schulz, dated August 15, 1961, reading:

(Reading) "Subject, top repair. Registered Home No. 61613, Model B-1—"

Not to be confused with the previous one which refers to 61713.

(Reading) "Dealer, Fortner Enterprises, Incorporated. The replacement sink top in the above registered home was starting to develop a crack between

the top and backsplash directly back of the bowl. This condition was reported in my memo to you concerning defective sink tops

(Vol. IX, p. 85)

dated 8-14-61. It was decided that an attempt to reseal the joint would be made and material for resealing was obtained from the Tafel Electric & Supply Company, 333 East Brandies Street, Louisville, Kentucky.

"Material used was Plastic Seam Filler—brand name, Kampel Seam-Fil. It was necessary to mix colors to obtain the flame color and two tubes of Seam-Fil were purchased, also a small can of solvent, necessary for cleaning.

"Colors used were Seam-Fil No. 905—yellow, two parts and Seam-Fil No. 922—red, one part. When mixed, the match was good on the flame top. The seam was sealed exactly according to directions and appears to have the joint sealed. Some shrinkage was noted after the first seal was made and the process was repeated in an hour. The second seal seemed to do the job satisfactorily."

(Vol. IX, p. 86)

That is Plaintiff's Exhibit No. 63 and we offer that in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 63 was received in evidence.)

Mr. Anderson: Paragraph 50 of the Request reads:

(Reading) "That Document 64 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated August 16, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is another handwritten memorandum from Mr. Moreillen to Mr. Schultz:

(Reading) "Subject, Sanford truss failure, BD-26A, twenty-four foot hip trusses, Registered Home No. 61957, Model B-144, dealer, Fortner Enterprises, Incorporated.

"Subject, trusses in the above

(Vol. IX, p. 87)

registered home were found to have failure in the bottom chord Sanford grid-plate connections located four foot in from exterior walls. They had allowed the sixteen-foot center section of the truss to settle below the bottom chord line.

"I reported this to our Quality Control and Bob Thomas made an inspection and found the 3 BD-26A trusses in the home to all be down. Ceiling drywall had just been started. It was recommended that no more ceiling drywall be installed before correcting the trusses.

"I went to the home on August 7, 1961, with straight two-by-six-eight foot pieces and installed them across the joints with one end resting on the exterior wall. A hydraulic jack was used under each joint to raise the bottom chord until level and the two-by-six pieces was securely nailed in place. This corrected the sagging

(Vol. IX, p. 88)

center section and held it securely.

"Mr. Robert Robinson furnished one man for three and a half hours to complete this job and the attached bill is for his services. Please arrange to have his bill paid."

This is Plaintiff's Exhibit No. 64 and we offer it in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 64 was received in evidence.)

Mr. Anderson: Paragraph 27 of the Request for Admissions reads:

(Reading) "That Document 167 is a one-page Daily Activity Report. Prepared by Paul Grayson, Sales Representative of Homes Division, in the regular course of his duties, dated September 5, 1961, and said document was prepared and maintained by United States Steel Corporation in the regular course of business."

Then, that document reads as follows:

(Vol. IX, p. 89)

(Reading) "9-5-61, Fortner Enterprises. Persons talked with, Earl Smith, H. Miles, Joe Powell, George Dannenfelser, Darrell Longest, Tom Hamilton, and others.

"Results of call; general meeting and inspection of Fortner's subdivision re: drywall, problems, sink top and window screen problems.

"It was agreed that window screens in some houses was too tight for proper operation. These tight screens will be replaced. The drywall problems are to be taken up with the U. S. Gypsum and U. S. Steel Homes Engineering Departments. An erection bulletin is to be prepared to cover the sealing of the sink tops at time of installation. Wrote one DPO for Fortner."

That is Plaintiff's Exhibit No. 167 and we offer that into evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 167 was received in evidence.)

(Vol. IX, p. 90)

Mr. Anderson: Now, Paragraph 56 reads:

(Reading) "That Document 77 is a one-page memorandum from M. R. Moreillen of Homes Division to Edward Akers of Homes Division, dated November 8, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is a typewritten memorandum with a subject of defective sink tops of dealer, Fortner Enterprises, Louisville, Kentucky.

(Reading) "A check was made this date to determine the actual number of defective sink tops that need replacement in the dealer's Golden Meadows project. I checked their complaint records and inspected sink tops in the homes listed below.

"Lot 104, Registered Home No. 61730, defective date 5-25-61;

"Lot 70, Registered Home No. 61810, Model B-1, defective date

(Vol. IX, p. 91)

6-20-61.

"Lot 63, Registered Home No. 61809, Model B-1, right hand; defective date, 6-26-61.

"Lot 27, office model home, Model B-23, defective.

"Lot 69, Registered Home No. 61712, Model B-23, defective.

"Lot 60, Registered Home No. 62069, Model B-1, defective.

"Lot 66, Registered Home No. 61731, Model B-1, defective.

"The above top has been replaced once—second top is bad.

"All of the tops listed above need to be replaced as soon as possible. In addition to the defective tops inspected there was one top that had been reported as being defective that was found to be with only an open joint. It had not started to delaminate so Earl Smith and I sealed it. This was on Lot 210, Registered Home No. 61820.

"If possible, it would be a great

(Vol. IX, p. 92)

help to the dealer if the lot number could be marked on the carton when shipment of replacement tops is made."

That is Plaintiff's Exhibit 77, and we offer it is evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 77 was received in evidence.)

Mr. Anderson: Paragraph 54 reads:

(Reading) "That Document 78 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated November 11, 1961, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is another handwritten memorandum with a subject of defective sink tops for Fortner Enterprises and reads:

(Reading) "The sink tops listed below were inspected on 11-10-61. Lot 367,

(Vol. IX, p. 93)

Registered Home No. 61957, Model B-144.

"The above top may have been ordered by Mr. Miles when he was at the plant this week. The top

is defective and replacement should be made.

"Lot 50, Registered Home No. 61613. The above top was replaced once and the replacement was sealed in the joint. Now, it has delaminated and a replacement is needed.

"This owner wants the replacement to be a post-form top if possible. He offered to purchase a replacement for the 5B Top 66ES MRCO RH, Flame if he could get the sink top replacement in the post-form top."

That is Plaintiff's Exhibit 78, and we offer it into evidence.

Paragraph 47 states:

(Reading) "That Document 61 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated November 11, 1961, and that

(Vol. IX, p. 94)

said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is another handwritten memorandum from Mr. Moreillen to Mr. Schultz of this same November 11, 1961, date and the subject matter again is on defective sink tops of Fortner Enterprises.

(Reading) "You are well aware of the trouble we have been having with the delamination in sink tops caused by water entering the joint directly back of the sink rim.

"In the past week I have been asked by Mr. Earl Smith to inspect ten alleged defective tops in the Golden Meadows project. Of the ten tops inspected eight were found to be delaminated. One had an open

seam that was sealed while I was there and one that had been reported as defective was found to be okay.

"It is getting quite expensive to keep on replacing sink tops especially

(Vol. IX, p. 95)

since we are finding replacements that have been installed to be delaminating after a couple of months use. I have personally sealed the joint back of the sink rim on some tops that are now starting to delaminate.

"Some of the home owners are now beginning to ask for replacement tops to be the new post-form tops. They have seen them in the display in the Golden Meadows project office.

"The sink top problem is serious and it is hard to foresee the end with new complaints being registered regularly. If you have any suggestions that would help end this problem, please pass them on.

"Mr. Earl Smith informs me that the plumber has resealed all tops at the time of installation for quite some time now, but still some of them delaminate."

That is Plaintiff's Exhibit No. 61, and we offer it into evidence.

(Vol. IX, p. 96)

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 61 was received in evidence.)

Mr. Anderson: Paragraph 53 of the Request for Admissions:

(Reading) "That Document 80 is a two-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated November 14, 1961, and that Document 79 is a "referral slip"

from Charles Schultz to Harry R. Black of Homes Division to which Document 80 is attached, and that said documents were prepared and maintained in the regular course of business by United States Steel Corporation."

This is another handwritten memorandum from Mr. Moreillen to Mr. Schultz with a subject of check made on single-hung Malta windows:

(Reading) "Quality Control carefully checked Malta single-hung windows in the plant and marked each one with a

(Vol. IX, p. 97)

penciled number for shipment. Mr. Robert Thomas informed me of this and asked I follow through and check the windows before and during erection of the home.

"I was at the building site when the shipment was opened and exterior walls were unloaded. The slab appeared to be level and no high or low spots were apparent to the eye.

"Windows were handled in a normal way without being bumped or dropped during unloading. All exterior panels were placed around the perimeter of the slab near the location they were to be erected. The area was level and all panels were flat on the ground—interior side up. Diagonal measurements were taken of all single-hung windows while they were in this position. Windows marked three, four, five, six and seven were single-hung. Windows, in the front of the home were diamond glass, horizontal sliding. Diagonals of

(Vol. IX, p. 98)

windows four, six and seven were within one-sixteenth

inch and the horizontal lines formed by the bottom of the sash and the sill were even.

"Window No. 5 was showing uneven lines and was carefully measured. There was a one-eighth inch difference in diagonals.

"Window No. 3 was the worst in appearance and there was a difference of three-sixteenths inch in diagonal measurements.

"I stayed at the site until after all exterior walls were erected and there was no difficulty in lining up exterior wall stud with screw holes in sill anchors. It was noted that horizontal lines formed by the bottom of the sash and sill changed when the adjacent panel was placed. This was on Window Nos. 3 and 5. Both had a better appearance with No. 3 looking much better.

"Diagonal measurements taken on

(Vol. IX, p. 99)

Window No. 3 were equal after walls were erected. Window No. 5 showed better than it did before erection; it was within one-sixteenth inch.

"All other windows checked the same after erection as they were before."

Then, Plaintiff's Exhibit No. 79, attached to this letter, is a referral slip and says:

(Reading) "This report covers our conversation the other night where you said you would bring this up verbally. The report indicates that the worst of five windows corrected itself perfectly after installation in the wall. Therefore, everything seems to depend upon the installation and the evenness of the slab.

"No distribution has been made on this. Fred Bey, however, was down there this morning talking to me about windows and looked at it."

Now, I can't really read the rest of it, and these are Plaintiff's Exhibit Nos. 79 and 80 and we move—we offer them into evidence.

(Vol. IX, p. 100)

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 79 and 80 were received in evidence.)

Mr. Anderson: Now, Paragraph 45 of the Request for Admissions reads:

(Reading) "That Document 209 is a one-page memorandum from M. R. Moreillen of Homes Division to Charles Schultz of Homes Division, dated December 9, 1961, and that Document 208 is a one-page "referral slip" from Charles Schultz to Harry R. Black of Homes Division with Document 209 attached, and that both documents were prepared and maintained in the regular course of business by United States Steel Corporation."

This is another handwritten memorandum from Mr. moreillen to Mr. Schultz with a subject of single-hung windows in Golden Meadows Subdivision, dealer, Fortner Enterprises, on Registered Home No. 62329, Plan 710 (B-23).

(Vol. IX, p. 101)

(Reading) "The above registered home, a model home in Golden Meadows Subdivision, has single-hung windows that are misfitting at the bottom. This home is nearing completion and Mr. Herman Miles is rightfully concerned about the windows. Some of the windows are open in one bottom corner while others are open in both corners. Windows may be closed as tightly as possible and both corners show daylight under the sash.

"Mr. Bill Klarer was to meet me at Golden Meadows Subdivision on 12-8-61 to study the problem, but he didn't get there. Fortner's field organization is expecting something to be done. This is not a new problem for reports have been made concerning misfitting windows for some time.

"We must come up with an answer soon. Mr. Miles is expecting some answer by the middle of next week."

Then, the memorandum attached to Plaintiff's

(Vol. IX, p. 102)

Exhibit 208 from Mr. Schultz to Mr. Black reads:

(Reading) "Locally, both Eagles Company and Fortner are screaming that something be done immediately on single-hung window problem. As I understand it, we are proposing a wood stool or sill similar to that outlined in my memo to you dated November 13th.

"The Eagles Company recently received by mistake an old set of steelstyle wood window trim containing the sill and cut it in the field to fit and hide the unevenness of the windows.

"Consequently, Joe Cameron likes the idea and wants something similar on future houses. Miles and Fortner was demanding some action and it was necessary to practically promise him the new trim right away. He more or less refuses to trim out future houses until he gets it. The change seems to be bogged down and we must

(Vol. IX, p. 103)

change quickly."

These are Plaintiff's Exhibit Nos. 208 and 209 and we offer them in evidence, Your Honor.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 208 and 209 were received in evidence.)

Mr. Anderson: Paragraph 38 of the Request for Admissions reads:

(Reading) "That Document 11 is a three-page memorandum from M. R. Moreillen of Homes Division to Harry R. Black of Homes Division, dated March 19, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

That is the one that I goofed because that is a one-page memorandum, right?

Mr. Reutlinger: That's right, yes.

Mr. Anderson: It should read "One" instead of "three". This is another handwritten

(Vol. IX, p. 104)

memorandum dated March 19, 1962:

(Reading) "As per your instructions, Malta windows in the Golden Meadows project were inspected this date. The complaint of windows not closing enough to lock easily was found to be correct on some windows. In all cases the windows causing trouble were ones with the old type vinyl sealer strip across the bottom of the single-hung window.

"I checked the windows where Bill Klarer had installed washers under the lock keeper. This method of correction had done a satisfactory job in allowing the window to be locked although it is not the answer to the problem. I checked the most recent shipment to the project and found all windows locking perfectly.

"There is a possibility that some of the trouble may be due to racking of window panels in erection which causes windows to get out of square."

This is Plaintiff's Exhibit 11 and we offer

(Vol. IX, p. 105)

it in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 11 was received in evidence.)

Mr. Anderson: Now, the next is two-pages, right?

Mr. Reutlinger: Right.

Mr. Anderson: Paragraph 39 reads:

(Reading) "That Document 12 is a two-page memorandum from M. R. Moreillen of Homes Division to Harry R. Black of Homes Division, dated March 19, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is a typewritten memorandum with a subject of Leigh Steel Folding Door Problems—Fortner Enterprises, Golden Meadows project and reads:

(Reading) "Inspection of steel folding doors in this project was made this date as you directed. It happened that two

(Vol. IX, p. 106)

representatives of Air Control Products, Mr. Frank Howard and his helper, Mr. Rickert, were at the plant working on doors and they went to Golden Meadows with me. Mr. Paul Grayson, Sales Representative for the area, was also with us when we checked the door problems.

"We went to the Model B-1 home being used for an office first. There was no one there but the door was unlocked so we went in and checked the steel folding doors. We found that the guide pins in the three-foot doors were jumping out of the top tracks when doors were opened and closed. Guide pins were installed in the wrong holes in the door and one top spring was only one-half engaged. The bottom spring

was cut off with only about one-half inch of the spring installed. This was found in one door. All other springs in doors in the home were okay.

(Vol. IV, p. 107)

"Bottom track end brackets were found to be reversed in some of the doors and it was in these doors that we found the guide pins in the wrong hole. We later learned that the doors in this home had been installed by Mr. Bob Robinson, Construction Superintendent for Fortner. A check of other homes in which the regular door installer had installed doors, they were found to be correctly installed.

"We went to the Plan 710 (B-23) home and found all three-foot closet doors jumping from the tracks when operated. This is a furnished model home and one which Mr. Claude Denton installed stronger springs in guide pins to stop guides from jumping from tracks. That solved the problem temporarily, but now they were found to be as bad as ever. Mr. Howard and his helper advised that the shape of the plastic cap on the guide pins was causing the trouble and they replaced

(Vol. IX, p. 108)

all guide pins on three-foot doors in the home with the new pins that are now being used. This seems to do the job as we couldn't get the new pins to jump the track.

"It was noted that the top of doors run ahead of bottoms when doors are closed. I called this to Mr. Howard's attention and his answer to that was that the light gauge metal used in the door caused this. I am inclined to agree with him and wonder if this could cause guide pin plastic caps to wear excessively and later start jumping from the track. If knobs were

located on guide panels of doors instead of pivot panels the doors would operate smoother and there would be less chance of guides jumping from tracks. Another door problem will be discussed on the following page.

"The second problem with doors in the project is that the pivot pin, bottom, will not stay in adjustment

(Vol. IX, p. 109)

in that it turns when the door is opened and closed until it eventually lowers the door until the top pivot is no longer engaged and the door falls.

"The bottom pivot pin is held with a pile nut (Stamped metal) and is not able to hold the threaded pivot from turning.

"Paul Grayson was present when doors were corrected about a week ago by the use of a lock washer and jamb nut on the pile nut.

"Mr. Earl Lee, of the Fortner organization, informed us today that the above correction worked okay and that there had been no complaint since the doors have been corrected.

"Mr. Frank Howard agreed that the pile nut now used on the pivot pin is frequently incapable of holding the pin securely and that the use of a jamb nut is a satisfactory solution to the problem.

"I would suggest that this problem

(Vol. IX, p. 110)

be taken up with the manufacturer and if possible get him to correct that problem instead of waiting for a door to fall on an owner's head and then having our dealers have to make the pivot pin secure."

This is Plaintiff's Exhibit No. 12 and we offer it in evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 12 was received in evidence.)

Mr. Anderson: Paragraph 43 of the Request reads:

(Reading) "That Document 30 is a one-page Daily Activity Report prepared by Paul Grayson of Homes Division, dated March 20, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

It reads:

(Reading) "Persons talked with,

(Vol. IX, p. 111)

Fortner's drywall countractor and Bob Robinson.

"Results of call along with Ed Akers, John Price and Bob Thomas inspected house being built at the Fairgrounds. Discussed drywall problems with the contractor."

That was Mr. Paul Grayson and that is Plaintiff's Exhibit No. 30 and we offer that in evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 30 was received in evidence.)

Mr. Anderson: Paragraph 46 of the Request reads:

(Reading) "That Document 141 is a one-page memorandum from M. R. Moreillen of Homes Division to Ed Akers of Homes Division, dated March 26, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

(Vol. IX, p. 112)

This is another handwritten memorandum dated March 26, 1962, to Mr. Ed Akers; subject Leigh Steel Folding Closet Doors for Fortner Enterprises.

(Reading) "In accordance with directions by Mr. F. Howard of Air Control Products, three closet doors

were taken from stock at the plant on 3-24-62 for use in replacement of defective doors in the Golden Meadows project.

"Doors taken were as follows; two left-hand 8030-2 three-foot doors; one right hand; return to plant—dispose of.

"Mr. Howard said that replacement could be made to us by his company or credit issued. No papers were used to take the door from our plant so this memo serves to give you the information and number of doors taken."

That is Plaintiff's Exhibit 141 and we offer it in evidence.

By the Court: Let it be filed.

(Vol. IX, p. 113)

(Whereupon, Plaintiff's Exhibit No. 141 was received in evidence.)

Mr. Anderson: Paragraph 37 of the Request reads:

(Reading) "That Document 10 is a three-page memorandum from M. R. Moreillen of Homes Division to Harry R. Black of Homes Division, dated March 26, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This is a handwritten memorandum, the last page of which has been typed so we could all read it, which reads:

(Reading) "On 3-22-62, I went to Golden Meadows Subdivision with Mr. Howard and his helper, Mr. Rickert of Air Control Products for the purpose of making corrections to Leigh steel folding door closets.

"As previously reported, Mr. Howard was of the opinion that the changing of the guide pins and the

(Vol. IX, p. 114)

use of heavier guide pin springs would solve the problem of the guide pins jumping the track, also the use of a jamb nut on the bottom pivot pin would hold that pin securely and solve the problem of doors loosening enough to cause them to fall.

"Our first stop was at the Kentucky State Fairgrounds where Fortner Enterprises is erecting a home for display in the Home Show. Mr. Howard and his helper changed all guide pins and springs in closet doors in that home. They also changed the hand of the doors so that knobs were located on that guide panels for smoother operation. To accomplish this it was necessary to exchange two right-hand P 8032-2 (three-foot doors) for two left-hand P 8030-2 doors; also two right-hand P. 8020 (two-foot doors) were exchanged for two P 8020 left-hand doors.

"I loaded the doors in my station

(Vol. IX, p. 115)

wagon, brought them back to our plant and exchanged them. The doors were operating well in the show home office installation.

"We proceeded on to Golden Meadows from the Fairgrounds and started correcting doors there. We worked in Golden Meadows until 6:00 P.M. on 3-24-62, at which time we had corrected the doors in homes on the following lots; Lot 187, Lot 186, Lot 185, Lot 196, Lot 194, Lot 477, Lot 211, Lot 478, Lot 212, Lot 209, Lot 68, Lot 78, Lot 82, Lot 202, Lot 412, Lot 176, Lot 391, Lot 49, Lot 48 and Lot 192.

"The above homes are all the ones with the new doors that are in Golden Meadows according to Mr. Earl Smith of the Fortner organization. We were in each home and made corrections by installing a new

guide pins and stronger springs, jamb nuts were installed on bottom pivot pins.

(Vol. IX, p. 116)

Stronger Springs were found in doors as shown above only.

"All doors were working without guides jumping from the track in occupied homes and in unoccupied homes where doors had been hung. Doors in sealed cartons were corrected with new guide pins, springs and jamb nuts the same as in homes where doors had been installed.

"Mr. Howard cleaned paint from the tracks and practically all homes where doors had been installed which made them operate much quieter. Tracks were lubricated with Simonize Carwax.

"Although doors all operated satisfactorily without jumping the track, they still seem flimsy and in most cases the top guide runs ahead of the bottom. Three doors were replaced, one in an occupied home, Lot 68, and two in one of the model homes. Broken welds were the cause

(Vol. IX, p. 117)

for change.

"I do not know if the work we did on doors will completely solve the problem—only time will tell, but I am of the opinion that the doors border dangerously on the flimsy side and will cause trouble unless very careful installation and adjustment is made."

That is Plaintiff's Exhibit No. 10 and we offer it in evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 10 was received in evidence.)

Colloquy

By the Court: Ladies and gentlemen; it is now noontime and we will adjourn for the lunch hour. Remember the admonitions of the Court and be back in your seats at one-thirty.

(Whereupon, at about the hour of 12 noon a recess was taken for lunch, reconvening at about the hour of 1:30 P.M., and the following proceedings occurred.)

* * * * * * *

(Vol. IX, p. 141)

(Whereupon, Mr. Kenneth L. Anderson, Esq., resumed the witness chair and the following proceedings occurred.)

Mr. Anderson: Now, Paragraph 42, and this again is from the Homes Division, Request for Admissions, reads:

(Reading) "That Document 29 is a one-page Daily Activity Report prepared by Paul Grayson of Homes Division, dated April 9, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This document reads:

(Reading) "From, Fortner Enterprises,

(Vol. IX, p. 142)

Louisville, Kentucky.

"Persons contacted; contact made in Jefferson County, Earl Smith, Howard Bolin and Earl Lee.

"Results of call; accompanied Ed Akers to investigate home owner complaint, Registered Home No. 61711. Complaint was on drywall job, several joints were pretty bad—also a few nail-tops on interior panels.

"Ed Akers plans to discuss this complaint with H. R. B."

Colloquy

And H. R. B. is Harry R. Black, is that right, Mr. Reutlinger?

Mr. Reutlinger: I would assume so.

Mr. Anderson: We offer that as Plaintiff's Exhibit No. 29, Your Honor, in evidence.

By the Court: All right.

(Whereupon, Plaintiff's Exhibit No. 29 was received in evidence.)

Mr. Anderson: Paragraph 41 reads:

(Vol. IX, p. 143)

(Reading) "That Document 21 is a one-page Daily Activity Report prepared by Paul Grayson of Homes Division, dated May 11, 1962; that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This again is on Fortner Enterprises, Louisville, Kentucky:

(Reading) "Talked with A. B. Fortner, Earl Smith at Golden Meadows, inspecting interior panels. Some of them seem to have warped and twisted studs. I plan on taking Ed Akers and John Price over Monday to see these panels before a decision is made on correcting the condition.

"Quite a lengthy speech from A. B. Fortner on what we should do for him and other dealers. One big problem here is the lack of sales; I'm sure of it."

That is Plaintiff's Exhibit No. 21 and we offer that into evidence, Your Honor.

(Vol. IX, p. 144)

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 21 was received in evidence.)

Mr. Anderson: Paragraph 40 reads:

(Reading) "That Document 20 is a one-page Daily Activity Report prepared by Paul Grayson of Homes Division, dated May 14, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

This reads:

(Reading) "Fortner Enterprises, Louisville, Kentucky.

"Persons talked to, Earl Smith and Bob Robinson.

"Results of call; I took John Price and Ed Akers over to inspect some interior panels that were bowed and also to see the gable panels that are causing trouble. New panels for

(Vol. IX, p. 145)

partition between L. R. (living room) and kitchen will be shipped to the job. Changes in gable panel design will be suggested."

That is Plaintiff's Exhibit No. 20 and we offer it in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 20 was received in evidence.)

Mr. Anderson: Paragraph 36 reads:

(Reading) "That Document 1 is a one-page memorandum from C. L. Schultz of Homes Division to Stanley J. Mack of Homes Division, dated June 18, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

Document 1 reads:

(Reading) "Subject, Fortner Enterprises.

"The writer visited the above dealer's project this date per your

(Vol. IX, p. 146)

request relative to difficulty in installing wood kitchen cabinets on steel interior partition walls. The problem is simply this; the small 4S molly bolts are of sufficient size to install through the thin veneer backs in the Scheirich cabinets; however the dealer feels that the thin veneer is not sturdy enough to support the cabinet properly and wishes to secure the cabinets to the wall through the heavier cabinet frame at the top and bottom. Therefore, a longer molly screw will be required. Suggest Engineering investigate and advise.

"They also have a rejection by F.H.A. on a special No. 710 Plan (formerly B-23 porch model) because of no metal flashing installed between the garage roof and the house gable filler. It was my understanding from Earl Lee that no flashing had been included with the 710. After checking the

(Vol. IX, p. 147)

shipping orders it appeared that flashing had been supplied.

"Called back and talked with Earl Smith who said that there was narrow flashing with the house, but his roofer felt that it was not acceptable and didn't use it. Since we have increased the size of the metal flashing this problem should be resolved in the future and no action required."

That is Plaintiff's Exhibit 1-BB, and we offer it into Evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 1-BB was received in evidence.)

Mr. Anderson: Paragraph 58 of the Request for Admissions reads:

(Reading) "That the following listed documents bearing numbers—"

And then there are ninety-four of them listed here:

(Reading) "—Homes Division invoices

(Vol. IX, p. 148)

or miscellaneous sales orders prepared and maintained in the regular course of business by United States Steel Corporation."

Now, these ninety-four invoices have been marked as Plaintiff's Composite Exhibit 1-DD and we move their admission into evidence, Your Honor.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Composite Exhibit 1-DD was received in evidence.)

Mr. Anderson: If the Court please, from those ninety-four invoices and miscellaneous sales orders I have prepared a compilation of, uh, according to lot number, with an identification of whatever item was replaced or, uh, shorted or whatever the situation was.

Now, I have some other information on this document which I think probably should be omitted since it attempts to pertain to Mr. Fortner's testimony and unless Mr. Reutlinger—

Mr. Reutlinger: (Interrupting) I don't know what it is yet. I know the documents;

(Vol. IX, p. 149)

you've shown me that.

Mr. Anderson: In other words, I think we ought to take that off and just refer to this compilation.

Mr. Reutlinger: Well, this is his testimony; I think we can identify it.

Mr. Anderson: If you don't object to it.

Mr. Reutlinger: That's what he said.

By the Court: Let it be filed.

Mr. Anderson: This is Plaintiff's Exhibit No. 35, Your Honor.

By the Court: All right.

(Whereupon, Plaintiff's Exhibit No. 35 was received in evidence.)

Mr. Anderson: I have entitled this "Complaints re components of U. S. Steel Homes", of U. S. Steel documents showing complaints or problems.

(Reading) "Lot No. 70, dated 12-6-61; sink top replaced; 6-20-62, sink top replaced; 6-20-61, header

(Vol. IX, p. 150)

for five foot Stl. No charge (Shortage)."

On Lot 212 there were no miscellaneous sales or invoices which I could attribute to Lot 212.

(Reading) "Lot 211, gutterboard shortage. Lot 215, seventy feet of one-by-six Nuloc (error in shipping).

"Lot 210, sink top replaced."

On Lot 208 I could find no miscellaneous sales orders or invoices.

(Reading) "Lot 389, 5-9-62. Item short in shipment. 5-16-62, four panels to replace warped panels. 5-24-62, one panel and three splines to replace ones which wouldn't align.

"Lot 391, 1-25-62; ceiling insulation shortage.

"Lot 189, 11-17-61; three hundred fifty feet Nuloc shortage (charged to Production Scheduling).

"Lot 190, 11-17-61; Nuloc shortage (charged to Production Scheduling). 10-10-61; three windows and one door exchanged, no charge.

"Lot 188, 8-4-61; threshold

(Vol. IX, p. 151)

supports and fascia shortage. 10-4-61, defective sink returned.

"Lot 187, 12-1-61; defective interior panels replaced. 3-2-62, sink top replaced.

"Lot 186, 11-17-61; Nuloc shortage (charged to Production Scheduling). 12-18-61, snap-on trim shortage. 3-2-62, sink top replaced.

"Lot 195, 2-15-62; wall cabinet shortage.

"Lot 196, 4-9-62; screens and sink top replaced."

On Lot 182 I could find no specific invoices or miscellaneous orders.

(Reading) "Lot 202, 12-1-61; interior panels replaced. 12-18-61, snap-on trim replaced.

"Lot 176, 12-1-61; interior panels replaced. 11-17-61; Nuloc shortage (charged to Production Scheduling)."

On Lot 79 I could find no evidence.

(Reading) "Lot 80, 10-6-61; windows

(Vol. IX, p. 152)

and so forth replaced.

"Lot 81, 5-24-62; window screens replaced."

On Lot 82 I could find no invoices.

(Reading) "Lot 83, 4-9-62; threshold and support shortage. 5-16-62, door jambs and stops error, no charge."

On Lot 84 and Lot 410 I could find no miscellaneous sales orders or invoices.

(Reading) "Lot 50, 7-20-61; sink top replaced. Manfacturing responsibility. 12-6-61, sink top replaced. 5-28-62, steel folding door replaced. 6-13-62, steel folding door replaced.

"Lot 20, 3-7-61; eight folding doors—shortage. 5-16-62, sink top replaced. 6-13-62, sink top replaced.

"Lot 19, 5-16-62; sink top replaced.

"Lot 104, 12-6-61; sink top replaced."

On Lot 336 I could find no invoices.

(Reading) "Lot 52, 8-15-61; sink top replaced. 6-20-61, shorted items.

(Vol IX, p. 153)

"Lot 51, 6-29-62; sink top replaced.

"Lot 66, 8-15-61; sink top replaced. 12-6-61; sink top replaced. 4-9-62, sink top replaced. 5-16-62, sink top replaced.

"Lot 69, 12-6-61; sink top replaced. 7-20-62, sink top replaced.

"Lot 323, 6-26-61; sill anchor shortage. 8-31-61, sink top replaced. 7-20-62, sink top replaced.

"Lot 65, 6-20-62; sink top replaced.

"Lot 57, 6-13-62; sink top replaced.

"Lot 363, 6-13-62; sink top replaced.

"Lot 59, 6-28-61; roof sheeting shortage. 5-24-62, sink top replaced.

"Lot 58, 5-1-61; ten pounds caulking compound shortage."

I could find no invoices on Lots 62 and 63.

(Reading) "Lot 367, 12-6-61; sink top replaced.

(Vol. IX, p. 154)

"Lot 319, 8-25-61; sink top replaced. 5-16-62, sink top and door replaced. 6-20-62, sink top and door replaced.

"Lot 67, 9-29-61; sink top replaced. 6-20-62, sink top replaced.

"Lot 21, 4-25-61; light fixture shortage.

"Lot 307, 7-20-61; sheathing shortage (charged to Sales Department).

"Lot No. 60, 9-7-61; sink top and closet doors replaced. 12-6-61, sink top replaced. 6-29-62, baseboard and other accumulated shortages. 7-20-62, sink top replaced."

On Lot 305 I could find no invoices.

(Reading) "On Lot 710, on 9-25-61; trim and fascia shortage. 9-26-61, gable filler and trim error replaced. 12-30-61, sink top replaced.

"Lot 64, 6-20-62; sink top replaced. 6-29-62, sink top replaced.

"Lot 68, 9-27-61; seventy feet Nuloc shortage."

(Vol. IX, p. 155)

I could find no invoices on Lot 61.

(Reading) "Lot 28, 3-7-61; truss clip shortage. 3-28-61, side rails for closet doors shortage. 5-24-62, sink top replaced.

"Lot 71, 6-20-62; sink top replaced.

"Lot 27, 12-6-61; sink top replaced. 3-2-62; sink top replaced.

"Lot 26, 6-20-62; sink top replaced."

On Lot 56 I could find no invoices.

(Reading) "Lot 217, 3-22-62; defective cabinet replaced.

"Lot 209, 12-1-61; defective interior panels replaced. 12-18-61, snap-on trim replaced."

On Lot No. 25 I could find no invoices.

(Reading) "Lot 72, 12-5-60; sheathing too short replaced.

"Lot 48, 12-8-61; sink top replaced.

"Lot 192, 11-29-61; track for folding doors replaced.

(Vol. IX, p. 156)

"Lot 78, 2-15-62; two wall cabinets shortage. 3-12-62; two interior panels warped replaced.

"Lot 185, 11-17-61; Nuloc shortage. 12-1-61, interior panels replaced.

"Lot 477, 11-3-61; door replaced. 1-26-62, light fixture shortage.

"Lot 412, 12-7-61; Gypsum shortage.

"Lot 478, 12-7-61; Gypsum shortage. 12-18-61, door replaced. 1-26-62, light fixture shortage."

On Lot 49 I could find no invoices.

Now, if the Court please, I have an additional document which has been marked as Plaintiff's Exhibit No. 36 which pertains to other shortages or replacements, but to which I cannot—I know they pertain to Fortner Enterprises, but we could not tie them to a particular lot. I offer this in evidence.

By the Court: Let is be filed.

(Whereupon, Plaintiff's Exhibit No. 36 was received in evidence.)

Mr. Anderson: 11-17-61,

(Vol. IX, p. 157)

twelve pieces, Gypsum shortage. 11-24-61, interior panels replaced. 11-2-61, sink top replaced. 11-15-61, accumulated shortages. 10-5-61, sink top and so forth replaced. 9-6-61, sill anchor shortage. 9-22-61, folding door shortage. 9-27-61, Nuloc and so forth shortage. 8-11-61, glass pane replaced.

7-7-61, wrong appliance request. 6-29-61, sink top replaced. 6-6-61, fascia control rail and so forth shortage. 6-15-61, steel folding doors and so forth replaced. 5-31-61, miscellaneous defective items replaced. 3-7-61, accumulated shortages. 1-31-61, erroneous cabinet tops sent. 1-20-61, wrong hand sink top replaced.

1-4-61, defective folding door replaced. 1-5-61, wood shutters replaced. 6-28-62, window sill shortage. 5-16-62, sill trim replaced. 4-3-62, defective folding doors replaced. 4-9-62, window sills replaced. 4-22-62, nine defective window screens replaced. 4-9-62, doors shipped, wrong place.

4-9-62, door jambs replaced. 3-13-62, sink top replaced. 3-26-62, defective door replaced. 1-6-62, inferior trim

shortage. 12-20-61, snap-on trim shortage. 9-28-61, sink top replaced. 3-1-61, jack assembly and clips. 6-28-61, roof sheeting

(Vol. IX, p. 158)

replaced. 7-10-61, base panels shortage. 11-10-61, gutterboard shortage. 8-1-61, glass broken, replace.

6-29-62, baseboard accumulated shortages. 6-8-62, plate glass per windows. 5-3-62, spray head parts replace.

Now, if the Court please, I would like to read Paragraph 62 of the Request for Admissions and this is a duplication of the top item that I have over there, but I want to do them for both parties:

(Reading) "That the estimated percentages of total shipments of the house packages by Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962, are; 1960, sixty-eight percent; 1961, seventy percent; 1962, seventy-five percent."

If the Court please, we would like to read portions of the deposition of Mr. David H. Boyd and if we could borrow the original—if Mr. Hamilton could borrow that, Your Honor.

By the Court: You want to take about ten minutes while he looks for that?

Mr. Anderson: All right, sir.

(Vol. IX, p. 159)

(Whereupon, at about the hour of 2:25 P.M., a recess was taken, reconvening at about the hour of 2:40 P.M., and the following proceedings occurred.)

• • •

Mr. Anderson: Now, I will read—this is the deposition of David H. Boyd, called by the plaintiff, for examination, pursuant to the Federal Rules of Civil Procedure, taken

pursuant to agreement on Tuesday, June 9, 1964, at nine-thirty o'clock A.M., on the Twelfth Floor Conference Room, United States Steel Building, 525 William Penn Place, Pittsburgh, Pennsylvania, with appearances, Mr. Hamilton and myself in behalf of the plaintiff and Mr. William H. Buchannan, of the Law Department of U. S. Steel Corporation and Mr. Reutlinger for the defendants.

David H. Boyd, called as a witness, and testified as follows and the examination, in other words, I will read the questions and Mr. Hamilton will read Mr. Boyd's answers.

(Vol. IX, p. 160)

(Whereupon, there followed at this point the reading of the following portions of the Deposition of Mr. David H. Boyd:

Pages 3, through 24, line 9;

Page 27, line 17, through page 29, line 10;

Page 49, line 14, through page 53, line 13),

• • • • • • •

(Boyd Depo., p. 3)

PROCEEDINGS

Mr. Reutlinger: Note that there has been a waiver of having the witness sworn.

David H. Boyd called as a witness and testified as follows:

EXAMINATION

By Mr. Anderson:

Q. Mr. Boyd, I believe you have given your name to the reporter as David H. Boyd?

A. That is correct.

Q. By whom are you employed at the present time?

A. United States Steel Corporation.

Q. And from what office do you work at the present time?

A. 525 William Penn Place, Pittsburgh.

Q. What position or job title do you hold at this time?

A. Manager, Production Supplies, Purchasing.

Q. Is this position which you now hold connected with a particular division of United States Steel?

A. This is a United States Steel Corporation position, not a particular division.

Q. Are you connected then with purchasing of all types of items for United States Steel?

A. Production supplies are identified as maintenance repair

(Boyd Depo., p. 4)

and operating supplies. This is the category.

Q. I see. How long have you held this particular position?

A. Since January 1, 1964.

Q. What position did you have with United States Steel Corporation prior to January 1, 1964?

A. Assistant to the Vice President of Purchasing, U. S. Steel.

Q. What duties were involved in that position?

A. Primarily the coordination of purchasing activities, with those of other departments of United States Steel Corporation.

Q. For how long did you hold that position?

A. One year.

Q. What position did you hold then prior to January 1, 1963?

A. President of United States Steel Homes Division.

Q. Now, for further purposes of this deposition and to shorten things a little bit, can we now call United States Steel Homes Division the Homes Division? I believe that is the general terminology that is used.

A. It is satisfactory as far as I am concerned.

Q. All right, sir. How long were you the president of the Homes Division?

A. Five years.

Q. That would have been 1958?

A. 1958 through 1962, approximately.

(Boyd Depo., p. 5)

Q. Were your headquarters in New Albany, Indiana, when you were the President of Homes Division?

A. For part of that period of time.

Q. For what portion of the period?

A. From June, 1961, through the balance of my term of office there which was the end of 1962.

Q. And what was your headquarters or locale prior to June, 1961?

A. Pittsburgh. Do you want a specific address?

Q. No, that is all right.

A. Pittsburgh.

Q. During the period 1958 through June, 1961, approximately how much time did you spend in New Albany?

A. Oh, I would have a difficult time recalling because there were a number of visits, but I would hesitate to give you a precise time or even a—

Q. Well, let me ask you this: Would you go to New Albany as much as once a week?

A. No, it was perhaps once every three to four weeks for three or four days, something on this order.

Q. Now, in 1958 when you first became the president of the Homes Division, who was your immediate subordinate?

A. Immediate subordinate? Well, there were several. There

(Boyd Depo., p. 6)

was no one immediately below me with general responsi-

bility. There was a—there were people in charge of various responsibilities in the operation: H. R. Black, sales; D. E. Longest, purchasing; George Dannenfelser, in charge of operations; C. K. Ross, comptroller.

I am trying to remember. This is—these were the principal people. At that particular point I can't recall who—I think—I can't recall who was responsible for treasury activities. I think it was J. J. Farrell who was treasurer, but I can't be absolutely certain of that in 1958. These were the principal.

Q. Did these five gentlemen whom you have named retain their respective positions during the entire time that you were with the homes division as its president?

A. Well, Mr. Black retained his sales responsibility. Mr. Dannenfelser retained his operating responsibility. Let's see, Mr. Longest retained his purchasing responsibility.

The other two gentlemen did not. There were subsequent appointments in these other two areas.

Q. Who succeeded Mr. Ross as comptroller?

A. W. E. Lewellen.

Q. And who succeeded Mr. Farrell?

A. O. E. Barnum.

(Boyd Depo., p. 7)

Q. Did those two gentlemen remain the balance of the period?

A. They remained during the balance of my tenure, yes.

Q. Addressing ourselves to Mr. Black, I believe it has already been indicated to us that Mr. Black's title was Vice President in Charge of Sales, is that correct?

A. That is correct.

Q. And what were Mr. Black's responsibility?

A. Well, as Vice President of Sales, he was responsible

for the administration of the total sales activity of U. S. Steel Homes Division and its sales personnel and the recommendations regarding sales policy.

Q. Mr. Boyd, at the time you were President of the Homes Division, were you an actual officer in United States Steel Corporation?

A. No.

Q. Is it usual or unusual in the setup or executive organization of United States Steel to have titles such as President and Vice President of divisional operations?

A. It is not unusual to have these titles, no.

Q. Now, will you tell us what your duties were while you were the head of the Homes Division?

A. Well, I suppose you could describe them as the overall responsibility for the activities of the division and direct

(Boyd Depo., p. 8)

responsibility for those activities, except for accounting and treasury.

Q. During the period 1959, let us say, through 1960, how many salesmen, approximately, did the Homes Division have?

A. Well, this number may have varied, but somewhere between 10 and 15 in that period of time.

Q. And during that period of time what general territory did you cover? And we have been given the names of states. I am not trying to pin you down. I am just trying to get a little background information here.

A. Well, we made sales generally in areas from east coast to as far west as Kansas City, Missouri, from the standpoint of east to west; and north to Chicago, Illinois; south to Nashville, Tennessee. This general area.

Q. I believe sometime in 1944 that the United States Steel Corporation acquired the Gunderson Homes?

A. Gunnison, G-u-n-n-i-s-o-n, Gunnison, yes.

Q. And the Gunnison Homes organization then became the United States Steel Homes Division of U. S. Steel, is that correct?

A. Well, this is not strictly correct and I can't give you precise dates, but the Gunnison Homes Division which existed in 1944 subsequently became United States Steel Homes Division.

(Boyd Depo., p. 9)

There was a series of changes which occurred. Ultimately it became United States Steel Homes Division.

Q. Let me ask you while it occurs to me: Who was your predecessor as the head of the Homes Division?

A. H. D. Moulton.

Q. Do you know whether or not he is still with United States Steel Corporation?

A. He is.

Q. Do you know where he is located at this time?

A. New York.

Q. What position does he have there?

A. I cannot be real precise, but my memory is that he is assistant to the administrative vice president international.

Q. Starting out in, let's say, the mid portion of the year 1959, if we were to look at an organization chart of the Homes Division, of course, you would be at the head of the chart as the President of the division.

Now, as I understand your testimony, Mr. Black, at least in one radius from the head, would be next in line in the sales line?

A. He was chief of the sales activities, right.

Q. Now, who would have been his—or who was in 1959—his immediate subordinate? Would that have been Mr. Cowart?

(Boyd Depo., p. 10)

A. I am having difficulty remembering precisely how this organization went in 1959.

Q. Well, I am not trying to confuse you—

A. It is difficult, because we made so many changes during my period of office where people's responsibilities were changed some from staff to line, and so forth, and I can't honestly—I can't be really precise here.

Mr. Cowart was in the organization, but I can't be precise as to his responsibilities at the time.

Q. I see. Well, let me ask you this: Did Mr. Cowart at some point during your tenure become the assistant to the vice president in charge of sales?

A. He did.

Q. Where would Mr. Stanley J. Mack have been in 1959 in the chain of command?

A. As best I can remember, he was responsible for sales promotion activities including advertising.

Q. He in that position would have been a subordinate of Mr. Black's.

A. Correct.

Q. Now, Mr. Edward L. Akers has been identified as being—sometime during this period—manager of the customer service division. Could you tell us whether or not during your tenure

(Boyd Depo., p. 11)

that was his position for the entire period?

A. As far as I can remember, it was.

Q. And would he also have been a subordinate of Mr. Black's?

A. He was.

Q. Mr. Neil Day has been identified also as having been with United States Steel Corporation, at least during a portion of this 1958 through 1962 period, and we have

been informed that his title was manager of field sales. Did he hold that position during the entire period of your tenure?

A. No, he did not. He held it during the early portion of the period and his responsibilities were changed somewhere during that time.

Q. What new title did he take on when his responsibilities were changed?

A. This I cannot recall precisely, but the title related to sales development and the cultivation of new accounts.

Q. What—while Mr. Day was manager of field sales, what were his responsibilities?

A. Essentially to work with the field sales personnel and largely a traveling responsibility to consult with field sales personnel and give them the benefit of headquarters thinking and this sort of activity.

Q. How were those responsibilities changed, or what were

(Boyd Depo., p. 12)

his responsibilities when he acquired this new title?

A. Well, as I said, this became essentially the development of additional new accounts, rather than the more generalized area of existing business.

Q. Is Mr. Day still with United States Steel Corporation?

A. As far as I know.

Q. We also identified Mr. Paul Grayson as being a sales representative for the Homes Division during the time that you were there. Is that correct?

A. That is correct.

Q. Would he be generally what we would call a salesman in the field?

A. That is right.

Q. And what generally were the salesmen's responsibilities; what were they supposed to do?

A. The salesmen had the responsibility essentially of working with the builder-dealers in the development of plans and programs for the erection and sale of U. S. Steel homes in the territory in which the salesman was assigned.

Q. Could you tell us during this period, '59 through '62, what territory Mr. Grayson was assigned to?

A. Again, I cannot be precise. As I recall he was assigned to territory generally encompassing souther Indiana and northern

(Boyd Depo., p. 13)

Kentucky.

Q. This would include the Louisville area?

A. It would include the city of Louisville and the general area around Louisville.

Q. Mr. Moreillon has been identified by me in the documents as either being a sales representative or a product service representative during this period of time in question. Do you know whether or not his duties were changed or just exactly what was his title, to the best of your recollection?

A. To the best of my memory, during the 1959 to '61 period, his duties were described by his title as product service representative.

Q. And what duties did that involve?

A. These people were responsible for working with the builder-dealer in the erection and completion of our houses and assistance in training dealer subcontractors in erection technique.

Q. During this period of time that we have been asking questions about, how many of the product service representatives did the Home Division have?

A. I can only guess from memory. Between six and eight, somewhere in that area.

Q. All right. Now, I don't believe I asked you what Mr.

(Boyd Depo., p. 14)

Cowart's responsibilities were during the period '59 through '61.

A. These were largely staff responsibilities and I cannot be precise again as to the extent. By staff, of course, I mean assistant to the vice president of sales, without direct line authority for the activities of others.

Q. Mr. C. L. Schultz, apparently during at least some portion of this time, was entitled manager of the product service division. I would assume from your previous testimony that he would have been the man in charge of the product service representatives?

A. That is correct.

Q. Now, would he fall under the authority of Mr. Black or under some other chain of authority in the operation?

A. He was under Mr. Black's jurisdiction.

Q. During this period of time what person or persons had the responsibility for deciding what models of prefabricated homes would be manufactured and sold by the Homes Division?

A. Largely this was a joint responsibility with the major recommendations being made by the sales executive and worked out jointly with other of the operating heads of departments, but largely the responsibility of sales, since they were closest

(Boyd Depo., p. 15)

to the market.

Q. Subject, of course, to your final approval?

A. Correct.

Q. And I believe the engineering department then handled the actual design of the homes?

A. The detailing.

Q. You have given us the general responsibilities of a number of people here in the chain of command. Were their duties assigned by you or did they have these positions prior to your coming with the Homes Division?

A. All of these in the time of which we are speaking had their principal duties assigned prior to my tenure with the Homes Division.

Q. Did your authority encompass the changing of these duties or—well, first of all, the changing of the duties?

A. Yes, subject to the concurrence of my superior for any persons who reported directly to me.

Q. The use of the terms "line" and "staff" have been made by you on occasion here. Just so—I think I understand what they mean, but I am not sure others will. Will you explain the distinction between line and staff in the chain of responsibility?

A. The line generally, as I understand it, have authority.

(Boyd Depo., p. 16)

for the management of personnel and affairs within the scope of the position and are responsible for results. The staff are generally in an advisory capacity.

Q. And Mr. Black and his subordinates would be in what you would call the line?

A. He had both line and staff subordinates, some of both.

Q. I believe the subordinates that we have discussed would be in the line category?

A. With the exception of Mr. Cowart and Mr. Mack at the time in question.

Q. I see. Well, that takes me back to Mr. Mack then,

for a second. As the manager of dealer sales what were his duties then?

A. We identify Mr. Mack first as manager of sales promotion in 1958. Subsequently he became manager of dealer sales.

Q. I see.

A. The question you asked is what would his responsibilities be under those circumstances?

Q. Yes.

A. Well—

Q. Well, I think the sales promotion is self-explanatory. That would be the staff position?

A. Yes.

(Boyd Depo., p. 17)

Q. And then the dealer sales would be the—

A. Line position in which he directed the activities of the salesmen, and essentially was responsible for—they reported to him for their activities related to the sale of the product.

Q. All right. During the period of time that you were head of the homes division, who was your immediate superior?

A. I had two: Mr. Norman B. Obbard, from the period 1958 through 1960, as I recall—and these are rough dates—his title was administrative vice president of fabrication and manufacture. Subsequently, from the period of 1961 until the close of my tenure, Mr. Austin J. Paddock with the same title.

Q. I take it these gentlemen were actually officers of United States Steel Corporation?

The Witness: Bill, you are going to have to answer this. Administrative vice presidents—

Mr. Buchanan: That is right.

By Mr. Anderson:

Q. You indicated a moment ago in your testimony that the gentleman who had the greatest influence on the decision as to changes in models would be Mr. Black, the vice president in charge of sales, as I understood your testimony.

A. That is correct.

(Boyd Depo., p. 18)

Q. Concerning a particular model of home that had already been established and set up in the Homes Division line, during this period of time, who had the greatest influence or decision-making authority with regard to the materials actually used in these packages?

A. I don't think you can assign this responsibility to any one individual or department. Sales, again, generally made strong recommendations as to the materials which were used and which, in its judgment, were most acceptable in the market place, subject to being tempered by the engineering and purchasing people in their investigations of materials and their costs, and so on

Q. Was there a policy in the Homes Division to use steel products in the prefabricated homes wherever possible?

A. There was a policy to introduce steel as a building material wherever it was economically feasible.

Q. In one particular example that I can recall, which is pertinent here in this period of time, at least some of the prefabricated packages which were put out by the Homes Division had the interior wall studs changed from 2 by 4's to a steel type of a stud. Do you recall that particular change?

A. Well, precisely, the division made a product during its lifetime in which wood studs were used. To describe them as

(Boyd Depo., p. 19)

2 by 4's might be slightly inaccurate because they were

not precisely 2 by 4's. I can't recall the dimensions, but I know that they were not 2 by 4's.

Subsequently, the use of a steel stud was introduced to replace the wood that was formerly used, yes.

Q. Was this wooden stud which you have described smaller or larger than a 2 by 4?

A. Smaller.

Q. We know generally, Mr. Boyd, that a—what is called in the building trade as a 2 by 4—actually doesn't meet the actual measurements of 2 inches by 4 inches, but it is this what you are generally attempting to describe?

A. No. Again my memory may be faulty, but a 2 by 4 in its finished form is approximately 1-5/8 by 3-5/8. The wood members that I have attempted to describe are smaller in dimension than this.

Q. By a fraction of an inch?

A. Oh, boy, I wish I could recall the exact dimension, but I can't. I am sorry, I just can't recall the exact dimension.

Q. All right. Taking that particular example of the change from the wood to the steel studding, who made the ultimate decision as to that particular change?

(Boyd Depo., p. 20)

A. Well, I certainly had a part in it. I would have to say that it was a joint decision made by our sales, operating, research, and development, and general management.

Q. By general management you mean yourself or your superiors?

A. Yes, both myself and my superiors.

Q. In other words, at least one element in the decision was the consideration of the use of this steel product instead of the wooden product, since United States Steel was the parent corporation?

A. This is correct.

Q. Now, Mr. Boyd, can you tell us when you first became aware of the existence of Fortner Enterprises and its possible use of the United States Steel homes?

A. At this point I can't give you anything approaching a precise date.

Q. Well—

A. I can only guess that it was perhaps late 1959, somewhere in that general area, but I am not certain. My memory could be faulty.

Q. Do you know the circumstances under which Mr. Fortner was originally contacted concerning the use of the United States Steel home?

A. No, I do not.

(Boyd Depo., p. 21)

Q. Digressing back to the previous subject a moment, were there occasions in which you received instructions from your superiors involving the particular components or particular components to be used in the United States Steel homes?

A. No, I can say that this did not happen.

Q. Taking again an example of the slatting or folding metal doors used in these model homes during this period of time, do you recall how the decision was reached to purchase the particular doors used in these homes?

A. I can't be precise here because I did not participate directly in that decision.

Q. Can you tell us what persons did participate or when the decision occurred?

A. To the best of my knowledge, this again would be reviewed prior to decision by sales, operating, engineering, and purchasing. Sales generally would have to be satisfied that the product was marketable so that these four departments would collaborate and sales generally had the strongest voice.

Q. Well now, were the folding steel doors that were used in the prefabricated packages during the time that you were there the same type doors that were already in use at the time that you arrived, or can you recall?

A. I can't recall this.

(Boyd Depo., p. 22)

Q. In our example of the folding closet doors, would one element in the—shall we say—decision to purchase X manufacturer's folding door over Y manufacturer's folding door be the use of X manufacturer of United States Steel in the manufacture of the door?

A. No, I don't believe so. Generally the evaluation was based on acceptability of the product for the function in the judgment of the people I mentioned, but with sales having the strongest voice as to that acceptability in the market place.

Q. I believe during the period of time that you were at the Homes Division or the head of the Homes Division that the U. S. Steel Homes Credit Corporation was in existence?

A. It was.

Q. Which we shall now call the Credit Corporation. That is all right with you?

A. That is sufficient for identification purposes.

Q. During the year 1959 and early part of 1960, I believe the Homes Division was attempting to gain an entry into what we call the Louisville market, is that correct?

A. I think we should say that we were trying to improve our participation in the Louisville market, yes.

Q. Up to that time your sales in the Louisville market were diminutive, were they not?

(Boyd Depo., p. 23)

A. They were small.

Q. I believe during this particular period of time that one sales tool, which I shall say for want of a better term, available to your salesmen was the putting forth to the prospective dealer of the use of the Credit Corporation as a means of financing?

A. Let us say that the salesmen were aware that U. S. Steel owned the Credit Corporation which was in business to provide financing assistance.

Q. I believe your salesmen were instructed generally during this period of time as to the types of financing assistance available through the Credit Corporation?

A. They were.

Q. And while the salesmen would not necessarily quote specific rates of interest or specifics of that nature, they, in making their sales presentation to a prospective dealer, would outline th[illegible]ype of program available through the Credit Corporation?

A. In very general terms, because the salesmen had no authority or responsibility for defining the financial assistance program. This was solely the responsibility of the Credit Corporation.

Q. And I believe the Credit Corporation was a com-

(Boyd Depo., p. 24)

pletely separate and independent corporate entity of its own as opposed to United States Steel or the Homes Division?

A. That is correct.

Q. The Homes Division actually was a division of United States Steel Corporation?

A. That is correct. It, itself, during this period of time, and, as far as we know, since then, has had no separate corporate entity from United States Steel Corporation?

A. Not since 1959 to date, that is correct.

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(Boyd Depo., p. 27)

Q. Now, in the processing of the establishment of dealerships and the financing that may or may not be involved, if financing is involved, was the procedure during the period 1958 through 1962 for the Homes Division to submit a request to the Credit Corporation for the Credit Corporation to enter into negotiations with the prospective dealer?

A. This was practiced, yes.

(Boyd Depo., p. 28)

Q. I will show you a document which has previously been identified by me in examining the documents furnished to me by Mr. Reutlinger on behalf of United States Steel Corporation as No. 42, bearing a date of September 22, 1960. I will ask you if you can identify that document?

Mr. Reutlinger: What number did you assign to it?

Mr. Anderson: 42. If Mr. Reutlinger would like to look at it first—

Mr. Reutlinger: Go ahead.

The Witness: I cannot specifically remember having read it before, but a copy to me appears portrayed at the bottom of the memorandum, and it is likely that I did so—

By Mr. Anderson:

Q. Well, let me ask you first: This document appears to have been written by Mr. Black to Mr. Rollins?

A. Rollins of the Credit Corporation.

Q. Would this be the ordinary procedure in which a presentation would be made to the Credit Corporation?

A. This is correct. These were the types of communications that were normal under these circumstances.

Q. I believe you will note in that memorandum that one of

(Boyd Depo., p. 29)

the reasons given by Mr. Black for his recommendation

is that this would give the Homes Division its fastest entry into the Louisville market.

A. This is what he says.

Q. Would this conform with your recollection of conditions as of that time?

A. Well, as I indicated, we desired to increase our participation and, as I recall, this, in our judgment, was one way to increase that participation for the period in question, which would have been the spring of 1961, as I recall.

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(Boyd Depo., p. 49)

Q. Now, you have indicated that you left the Homes Division as of January 1, 1963.

A. To be precise, as of January 14, 1963.

Q. All right. What were the circumstances under which you left the Homes Division?

A. Well, this may take some portrayal of circumstances.

In 1962 I discussed with my superiors a feeling that I had—and in which they generally concurred—that our sales and distribution program needed a person or persons with background and qualifications which were better suited to the job

(Boyd Depo., p. 50)

to be done in the sales area.

We were not achieving the sales results that I felt we should.

So we began to search for this kind of talent. This led us to Mr. Forest J. Stump, who is the present president of U. S. Steel Homes Division.

We discussed with him the possibility of using his organization—which at that time was known as Ohio Homes Distributors—and using him personally in a sales

and distribution capacity, which meant a considerable change in our whole program of sales distribution.

And this was reviewed and discussed and at management levels, both at U. S. Steel Homes Division and U. S. Steel Corporation, and for various reasons which—all of which are not known to me personally, but for various reasons it was determined that the arrangement which we had proposed would not be a workable one and subsequently in order to get the sales and distribution talent which Mr. Stump offered, it was determined that this was important enough to call for a transfer for me to United States Steel Corporation in a position which was open in purchasing and for Mr. Stump to succeed me as president of U. S. Steel Homes Division.

So that was the general circumstance that surrounded this.

(Boyd Depo., p. 51)

Q. Did this transfer to the purchasing of United States Steel Corporation result in a decrease in salary on your part?

A. A modest decrease in salary, yes.

However, this is a relative thing, because as President of U. S. Steel Homes Division my salary was fixed, and in my new responsibility in addition to salary, I participate in a general management incentive program which supplements salary, which was not available to the President of the Homes Division.

Q. Mr. Boyd, I show you a document entitled "Underwriting Agreement" dated March 30, 1962, which has been identified as Document No. 237, obtained from United States Steel.

Are you familiar with that underwriting agreement?

A. Yes. I was signatory to this agreement.

Q. Would you give us the background of this particular agreement?

A. Well, I can only say that it was determined after a review of the way in which we did our business and the basis on which we recommended loans to the Credit Corporation that U. S. Steel Homes in its commercial judgment, if it wished to recommend a loan be made to a builder-dealer, and subsequently the Credit Corporation determined that the financial aspects of such a loan indicated a relatively high risk because of the extent of capital which the Credit Corporation provided to the

(Boyd Dep., p. 52)

builder, we in turn were asked to underwrite the amount of such loans in order to protect the corporation against losses which it might incur if the builder-dealer failed to have the success in his enterprise that we commercially thought he might obtain.

Q. I believe Fortner Enterprise loans or a portion of them are the subject of that agreement?

A. Yes, Fortner Enterprise loans were.

Q. In other words, this situation was one in which the Homes Division could continue to use the Credit Corporation as one of its sales means of obtaining business and yet, at the same time protect the Credit Corporation in certain instances?

A. It was to protect the Credit Corporation in what we might describe as—or what the Credit Corporation described as relatively high risk loans, yes.

Q. Going back for a moment to your statement with regard to the circumstances under which you transferred from the Homes Division to United States Steel itself, you indicated in your statement that the failure of the Homes Division to obtain the sales results that you thought possible was apparently the principal ground for this shift.

My question is what are the underlying facts available

Deposition of Mr. David H. Boyd

(Boyd Depo., p. 53)

or known to you with regard to the failure of the Homes Division to attain the sales potential which you saw in that company?

A. I think it relates to a large degree to the people who executed that part of the activity, and their background, training, and capabilities.

We did not have, for example, the sales management positions people with experience in the actual sale of home products in the field, people who, perhaps, were as fully acquainted with all of the aspects of home building and selling as the customer, and it was the feeling that someone with a broader background in the field of sales and distribution of housing products would be more capable of performing this function.

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TRANSCRIPT OF PROCEEDINGS

VOLUME X

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Tuesday, June 16, 1970.

(Vol. X, p. 3)

By the Court: Good morning, ladies and gentlemen; are we ready to begin?

Mr. Anderson: Yes, Your Honor. We will call Mr. Allen Nash.

MR. ALLEN NASH, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to wit:

Direct Examination

By Mr. Anderson:

Q. Mr. Nash, would you give us your name, please?

A. Allen Nash.

Q. What is your business or occupation?

A. I am a realtor and real estate appraiser.

Q. And how long have you been such, sir?

A. Twenty-one years.

(Vol. X, p. 4)

Q. And have your activities been in the Louisville and Jefferson County area?

A. Yes sir.

Q. Mr. Nash, were you appointed by the Court to be one of the appraisers in the action involving foreclosure on the Golden Meadows Subdivision?

A. Yes sir; I was.

Q. And as such appraiser did you make a lot by lot appraisal of the property out there?

A. Yes sir; I did.

Q. Now, Mr. Nash, for the purposes of expedition this morning, I have already worked upon the paper here the figures which I obtained from your appraisal report and which I would like—uh, what I would like to do is take this group by group and just ask you about them, sir.

A. Yes.

Q. And of course, you can refer to your report in this connection. First of all, what does your appraisal represent?

A. Uh, it represents the fair market value at that particular time.

Q. All right; and when was the appraisal made?

(Vol. X, p. 5)

A. Well, I gave a date of February 25th, 1964.

Q. All right. Now, as to Paragraph 1, sir, were these particular five lots improved or unimproved?

A. Those particular five were improved.

Q. And what do we mean by "Improved"?

A. Well, we mean that there was a structure on them.

Q. All right sir; and for the five lots do the figures that I have here accurately reflect the appraisals?

A. Yes sir; they do.

Q. All right; and you can check my mathematics on these as we go along too. What is the total appraisals on the five pieces of property that had houses on them?

A. Excuse me; could we move that a little closer; I'm having trouble here.

Q. Yes, is that better?

A. It is $40,100. Is that what you have there?

Q. Yes.

A. I'd say that is correct.

Q. Now, sir, as to the second paragraph,

Group 1, do the figures that I have on the sheet accurately represent your appraisal for that particular group?

A. Yes sir; it does.

Q. And is my total of $16,700 correct?

A. Yes sir.

Q. All right.

Mr. Reutlinger: Speaking of Paragraph 1 from the sale, improved properties?

Mr. Anderson: Yes.

Mr. Reutlinger: On Paragraph 2 is $16,000.

Q. Now, on Paragraph 2, Group 2, have I accurately reflected your appraisals on that, sir?

A. I'm sorry, Mr. Anderson, I can't see it from here.

Q. Well, do you have the totals by groups?

A. Yes, I do.

Q. Well, I—

A. (Interrupting) I can't see over there with these on and I can't see without them on.

Q. All right.

A. I am in bad shape, you see.

Q. Well, let's move it up here then; now,

(Vol. X, p. 7)

can you see this?

A. That's fine; twenty-eight; that's right.

Q. All right sir; now, is Group 3 on there also?

A. Yes sir.

Q. Have I accurately reflected your appraisals as to Paragraph 2, Group 3?

A. I believe there is a $100 discrepancy there, Mr. Anderson, on Lot 100 there, you have two and it should be twenty-one.

Q. All right; Lot 100 should be twenty-one.

A. Yes, on down the next one, the next one down.

Q. All right.

A. Total of twenty-four, fix; all of the rest are correct.

Q. I had the third one down incorrectly; is that right?

A. That's right; No. 100, and it should have been $2,100, for a total of $24,600 rather than $24,500.

Q. Now, Paragraph 2, Group 4, Mr. Nash; does that accurately reflect the appraisals on those lots?

(Vol. X, p. 8)

A. Yes sir; it does.

Q. And is my total correct?

A. Yes sir; $20,500.

Q. All right. Now, Paragraph 2, Group 5?

A. Yes sir; that is correct.

Q. And is my total of $16,200 correct?

A. Yes sir; it is.

Q. All right. Paragraph 2, Group 6, sir?

A. That is correct; yes sir.

Q. And what is the total of that?

A. $20,200.

Q. All right; Paragraph 2, Group 7, are my figures correct there?

A. Yes sir; they are; $28,400.

Q. And Paragraph 2, Group 8?

A. Yes sir; that is correct, total $10,000.

Q. Total of $10,000; and then Paragraph 3, Group 1, are my figures correct there?

A. Yes sir; correct.

Q. And the total of $16,400; is that right?

A. Yes sir; that's correct.

Q. All right; now, Paragraph 3, Group 2, are my figures correct there, sir?

A. Yes sir; the total $24,200.

(Vol. X, p. 9)

Q. All right; Paragraph 3, Group 3, Mr. Nash; are my figures correct there?

A. Yes sir; total of $16,000.

Q. And now I will ask you if my figures as to the totals of Paragraphs 1, 2 and 3 are correct or whether you figured those up?

A. I did not.

Q. All right; can we go through?

A. Yes, we can.

Q. And do that quickly and I want to be sure that my figures are correct.

A. Yes sir; that is correct.

Q. All right. What then was the total amount of your appraisal on the property in the Golden Meadows on a lot by lot basis?

A. $261,300.

Q. $261,300?

A. Yes sir.

Q. Now, Mr. Nash, did you make this appraisal in conjunction with anyone else?

A. Yes sir; I did.

Q. And who was that?

A. Mr. John Prood.

Q. All right; did you and Mr. Prood make

(Vol. X, p. 10)

the appraisals separately or jointly?

A. No sir; it was a joint appraisal.

Q. All right. Now, Mr. Nash, did you also appraise this property at the same time on a parcel-type basis?

A. You mean a group?

Q. Group.

A. Group, yes we did; yes sir.

Q. And were the group appraisals more or less than the individual lot appraisals?

A. Totals?

Q. Yes sir.

A. No, they were less—less.

Q. All right. Mr. Nash, in your opinion as a real estate man and appraiser which appraisals, the lot by lot appraisals or the group appraisals fairly and reasonably represent the fair market value of this property at the time the appraisals were made?

A. Well, I would say the single appraisals over the group.

Q. All right.

By the Court: I didn't get the answer.

Mr. Anderson: He said he

(Vol. X, p. 11)

would say the single appraisals over the group, Your Honor.

The Witness: On a per parcel basis.

Mr. Anderson: I believe that's all I have.

CROSS-EXAMINATION

By Mr. Reutlinger:

Q. Mr. Nash, I don't believe you have any interest in the outcome of this lawsuit, do you?

A. No sir; I do not.

Q. Matter of fact, you were appointed by the Court, I believe, by Judge Shelbourne, to make the appraisal and you and Mr. Prood did that?

A. Yes sir.

Q. You have had experience in Court-appointed appraisal work prior to that time?

A. Yes sir; thirteen years of it.

Q. And this particular appraisal, you knew, was for a foreclosure action?

A. Yes sir; I did.

Q. And you were directed by the sale bill which you may or may not know embodied the Court's order, but in

any event you were directed by the sale

(Vol. X, p. 12)

bill and the Court to appraise not only individually, but in parcel and groups and so forth?

A. Yes sir.

Q. Which of course you have done.

A. Yes sir.

Q. And you have a copy of that appraisal before you?

A. Yes.

Q. Now, let's start with this premise; the individual lots you have appraised are out there in Golden Meadows, and that is land, isn't it?

A. Yes sir.

Q. To convert that land to money at a fair market value you have got to sell it, don't you?

A. That is correct.

Q. And to sell by groups as sometimes is done at a foreclosure sale and that's the reason we have three different appraisals in a foreclosure sale, isn't it?

A. Yes sir.

Q. That is done with the stroke of a hammer and as you know the Commissioner offers them individually and as groups and so forth?

A. Yes.

(Vol. X, p. 13)

Q. All of this is true, but if you were going to sell on the open market the lots, one by one, you have to pay a commission, wouldn't you; you have to have some selling effort?

A. It would have to be a selling effort, but not necessarily a commission be paid.

Q. Well, selling effort—someone has got to be compensated for that, wouldn't they?

A. Well, uh, if a real estate agent was handling it in

the normal procedure it would be that he would be paid a commission, but if the owner sells it himself he doesn't consider that.

Q. I understand that, but if the owner sells it himself he has devoted some time and effort to selling—to the selling process, hasn't he?

A. Yes sir.

Q. Time is money, isn't it?

A. Yes sir.

Q. All right; if it were sold by a real estate agent he is compensated for his time and effort by way of commission, isn't he?

A. That is correct.

Q. And if it is sold by the owner, while he doesn't take a commission out of one pocket and put

(Vol. X, p. 14)

it in the other he has devoted that time to selling which he could have devoted to something else?

A. That is correct.

Q. What was the real estate commission on vacant property at that time; ten per cent, I believe?

A. Ten per cent.

Q. And on an approved property, I believe it was five per cent?

A. At that time five, yes.

Q. I think you have gone up a little since, but that's beside the point.

A. Yes sir.

Q. With regard to the improved properties, and there were five in number, were those completely—were they complete in each instance or were some of those lots partially improved? Now, we have pictures here; did you bring the pictures that you submitted?

A. No, I didn't; this came on me rather suddenly and

I have misplaced them somewhere; it's been quite a number of years.

Q. What is your recollection on that individual appraisal?

A. I can't remember the houses; at one time

(Vol. X, p. 15)

they were either complete or essentially complete, but they had been vandalized.

Q. That is my impression.

A. Yes sir.

Q. So, the discrepancy, the apparent discrepancy in your appraisal of approved property is to the degree of vandalism —

A. (Interupting) The degree of vandalism and everything that had been done.

Q. Destruction, we have here I believe five pieces of improved, but damaged property?

A. Yes sir.

Q. This is kind of unfair to you because while you were testifying I took the liberty of counting the number of undeveloped lots. I suggest to you that there are one hundred six in all; does that seem about right?

A. That seems about right.

Q. All right; and of that one hundred six, seventy-eight would be covered in Paragraph 2 of the sales bill?

A. Yes.

Q. And twenty-eight in Paragraph 3 of the sales bill?

(Vol. X, p. 16)

A. Yes.

Q. And I believe there was an undeveloped tract of about five acres?

A. Yes sir.

Q. Which was in Paragraph 2 of the sales bill?

A. Yes, it was.

Q. How long would it take to liquidate on a sale by sale basis or individual basis the five improved properties?

A. How long would it take?

Q. Yes, in your experience as a realtor; you just don't—it's not like selling tablets in the dime store is it?

A. Well, no, but I can't answer you how long, but I—

Q. (Interrupting) No, your best judgment; I know.

A. Well, my best judgment is if I were going to sell them I would look for someone to peddle all of the five to at one time and let him assume the responsibility of putting it back.

Q. Yes, sell as a group.

A. Yes.

(Vol. X, p. 17)

Q. So, that would be the most efficient way to sell the five properties?

A. If you could get someone to buy it.

Q. If you could get someone to buy it.

A. Yes sir.

Q. Well, how long would it take you to sell the seventy-eight lots in Paragraph 2 of the sales bill if you are going to do it unit by unit, or would you do it the same way?

A. Well, probably offered—are you saying if I was going to do it as a real estate man?

Q. Yes sir.

A. I would probably offer it either way. I would probably go in the first thing and try to find someone, a man who would take the lots and pick up the pieces, whatever they were, or the whole and let him do the disposing of them to subcontractors or subbuilders.

Q. In other words, if I understand your testimony correctly you are saying that on the vacant lots, and let's not pick between Paragraph 2 or 3.

A. No, that's all right.

Q. You would take the vacant lots and see if you could sell them as a group?

(Vol. X, p. 18)

A. Try that, yes.

Q. Try that; that would be the most efficient?

A. Yes sir; it would.

Q. Right, because if you tried to see them out, one hundred and six of them one by one that would take time?

A. Yes, it would.

Q. And effort?

A. Yes sir.

Q. Can you give us any idea of the amount of time you would think it would take to move one hundred and six undeveloped lots?

A. There is no—now way to estimate it.

Q. It would take a considerable time?

A. Yes, it would take a considerable time.

Q. You are of course—your undeveloped tract would be—there it is, it's all by itself.

A. Yes sir.

Q. And if you could find a buyer, fine, and if you don't, I mean—

A. (Interrupting) Yes. Well, that might be more marketable than some of the others.

Q. I would think so.

(Vol. X, p. 19)

A. Yes.

Q. Now, if all of this property is encumbered with a mortgage and money is owed on it, if you took the time to sell it individually, the interest was running on that mortgage, isn't it?

A. Yes sir.

Q. Whatever it is?

A. Whatever it is; yes sir.

Q. For the length of time it takes you to peddle them one by one?

A. Yes sir.

Q. Whereas if you sell them as a group you certainly make some arrangement with the financing agency?

A. Yes sir.

Q. And your interest stops, doesn't it?

A. Yes.

Q. Now, did you at the Court's direction, prepare an appraisal of the five improved properties as a group as enumerated in Paragraph 1 of the sales bill?

A. Yes sir.

Q. Paragraph 1 of the sales bill, which is five houses and lots, and I believe your appraisal of those five properties was $30,000 as a group?

(Vol. X, p. 20)

A. As a group; yes sir.

Q. Yes. I'm going to put "Appraisal" at the top here and in Paragraph 2 of the sales bill you sold or appraised the seventy-eight lots and a five acre more or less tract.

Now, as a group, I believe you appraised everything described in that Paragraph 2, which was the seventy-eight lots and the five acre tract at $125,000; is that correct?

A. Yes sir.

Q. And then Paragraph 3 of the sales bill, you had twenty-eight lots and as a group I believe you appraised those for $40,000?

A. Yes sir.

Q. Now, you may assume that the five properties in the sales bill were sold for $35,200 at the Courthouse door. Based on that assumption, the sale price as a group which you have told us was the most efficient way was $5,200 above your appraisal, wasn't it?

A. Un-huh.

Q. And you may assume that the property described in Paragraph 2 of the sales bill were sold for $129,000 and if so, the sale price of the properties

(Vol. X, p. 21)

in Paragraph 2 sold as a group which you have told us is the best way to handle it, exceeded your appraisal by $4,000?

A. (Witness nodded head affirmatively.)

Q. My arithmetic is right, isn't it?

A. Yes sir.

Q. All right; and the lots in Paragraph 3 of the sales bill, you may assume, were sold for $42,500 as a group and if that is true then they were sold as a group, which you have told us is the most efficient way to handle it and that group brought $2,500 above your appraisal values?

A. That's right.

Q. And if my arithmetic is right, the appraisal of the properties as a group was $195,000 and again, with the same assumption that I can add correctly, then they were sold for $206,700, or sold for $11,700 more than the appraisal and is my arithmetic right or fairly right; I'm not trying to—

A. (Interrupting) Yes.

Q. All right. Now, you appraised these properties as a group or in three separate groups?

A. Yes.

Q. Pursuant to Court order?

(Vol. X, p. 22)

A. Yes sir.

Q. And you may assume they were sold in three separate groups because this is the record and we have stipulated that.

A. Excuse me; are these the actual sales prices?

Q. Yes sir; this has been stipulated by us.

A. I see; prior to my getting here.

Q. Well, Mr. Mudd, who conducted the sale has filed a report of sale.

A. Yes.

Q. So that when sold, in groups, which is the best way to handle it which you have already told us?

A. Yes sir.

Q. They brought $11,700 more than you might have reasonably expected?

A. Yes sir.

Mr. Reutlinger: That's all I have of this witness.

Redirect Examination

By Mr. Anderson:

Q. Mr. Nash, your appraisals on a lot by lot basis that you told me about on direct examination

(Vol. X, p. 23)

totalled $261,300?

A. Yes.

Q. You recall that?

A. (Witness nodded head affirmatively.)

Q. Using Mr. Reutlinger's $206,700 figure as he has indicated we have represented or stipulated to be the amount of the sale, check my mathematics, but on this basis, the property sold for $54,600 less than your appraisal?

A. That is true when we are using the lot basis; that's right.

Mr. Anderson: That's all.

Recross-examination

By Mr. Reutlinger:

Q. Mr. Nash, can you define fair market value?

A. Can I define fair market value?

Q. Yes sir; would you?

A. Yes sir. Fair market value is that amount which a

property will bring expressed in terms of money, exposed to the market for a reasonable time, neither the purchaser nor the seller being under any compulsion or duress to sell. In other words, it's a—

Q. (Interrupting) You forgot the appraisal

(Vol. X, p. 24)

a little differently, but that's—

A. (Interrupting) Well, there is the time.

Q. Time to consummate the sale?

A. Yes sir.

Q. Would you say this was a reasonable exposure on the market?

A. Yes sir; it is.

Mer. Reutlinger: That's all.

Redirect Examination

By Mr. Anderson:

Q. Is a forced sale such as a foreclosure sale, does that fall under your definition of fair market value?

A. Well, not really. It's limited—when it is a foreclosure sale it is usually a limited amount of purchasers.

Q. A distress sale?

A. Yes sir.

Mr. Anderson: That's all.

Recross-examination

By Mr. Reutlinger:

Q. Mr. Nash, I understand that and I thoroughly agree with you, but your appraisals were based on fair market value, weren't they?

(Vol. X, p. 25)

A. Yes sir.

Q. That's what I thought.

A. Yes sir.

Mr. Reutlinger: All right.

Mr. Anderson: We have nothing further.

By the Court: You may stand aside.

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(Vol. X, p. 26)

Mr. Anderson: I would like to call Mr. Edwin Horn.

MR. EDWIN HORN, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Anderson:

Q. Good morning, Mr. Horn; would you give us your name, please, sir?

A. Edwin Horn; Edwin D. Horn.

Q. Please speak up a little bit louder so everybody can hear you. Mr. Reutlinger has to hear you over there too.

A. All right.

Q. Where do you live, sir?

(Vol. X, p. 27)

A. What is the question?

Q. Where do you live, sir?

A. In—uh, 5803 Round Hill Road.

Q. And with what company or companies are you associated at the present time?

A. With the Louisville Mortgage Service Company.

Q. And how long have you been associated with that Company?

A. Seventeen years.

Q. And what is your position with that Company at this time?

A. I am President.

Q. How long have you been President?

A. Seventeen years.

Q. Uh, prior to your going with the Louisville Mortgage Service Company, what business were you, or occupation did you have?

A. I was with the Louisville Title Company.

Q. And how long have you been associated with the real estate business?

A. Around thirty-six years.

Q. And how long have you been involved or associated with the financing business?

(Vol. X, p. 28)

A. Around the same time; thirty-six years.

Q. All right; since you have been the President of Louisville Mortgage Service Company, would you tell us, uh, first of all, what the functions and services of that company are?

A. We make all types of, and have made all types of real estate loans to, uh, for the purpose or construction of homes, uh, hotels, office buildings, industrial plants; most any type of real estate you can think of. Of purpose is to facilitate the sale and the construction of these facilities.

Q. All right. Now, sir, as President of the Louisville Mortgage Service Company, are you familiar with the types of financing available in the years 1959, 1960 and 1961 in the, uh, Louisville and Jefferson County area and this general—uh, this general vicinity?

A. I am.

Q. Does the Louisville Mortgage Service Company act as a broker for other lenders?

A. Yes. For the most part, uh, we represent life insurance companies and savings, uh, banks and, uh, commercial banks who appoint us as their representative in this area to lend funds for them. We

(Vol. X, p. 29)

do lend some of our own funds too, but our major business is with these large investors.

Q. All right; before I forget it, uh, tell us the relative size of the Louisville Mortgage Service with other lending institutions in the mortgage filed in this area?

A. Uh, mortgage companies are usually judged by the amount of loans they service and we have been at the head for the last—for all this period.

Q. For the entire time that you have been the President of the company?

A. Yes.

Mr. Reutlinger: Mr. Horn; he—please keep your voice up. You tend to lower it.

The Witness: Yes; all right; would you want me to repeat that?

Mr. Reutlinger: No, sir.

The Witness: All right.

Q. Mr. Horn; are you familiar with the loans which were made to Fortner Enterprises, Inc., in October of 1960 and August of 1961 pertaining to the Golden Meadows subdivision?

A. Yes. Mr. Fortner discussed those with me and I reviewed his papers, I think, at the time they

(Vol. X, p. 30)

went into this.

Q. All right. After those loans were entered into, did the Louisville Mortgage Service Company service them?

A. No, no; we didn't service it.

Q. Did you have any connection with 'em?

A. The loan, as I recall, had to do with the development and construction—uh, the development of the subdivision and the construction loan for the homes to be built there. We took no part in that.

Our part came, uh, at the end when Mr. Fortner sold the loans. We made the permanent loans, as we call them, the final loan to the purchaser on those houses.

Q. All right. Now, Mr. Horn, based on—uh, you have told us that you were familiar with the types of financing available in, uh, 1959, 1960 and '61.

A. (Witness nodded head affirmatively.)

Q. Would you tell the jury if one hundred per cent land acquisition and development loans were available in this area during that period of time?

A. To my knowledge, they were not. I believe if they had been, I would have known about it,

(Vol. X, p. 31)

because we had taken such an active part in the financing and construction of homes that I believe I would have known about it, but to my knowledge, there were none available at that time.

Q. All right; were there any companies, to your knowledge, willing to make such loans in 1959, 1960 and 1961?

A. Uh, a number of developers secured development loans through the commercial banks. In these cases, they were more of a loan on the credit of the developer rather than on the security that was offered. By the security, I mean the land that was to be developed.

That is what we refer to in our industry as a line of credit only, where a man has a line of credit with a bank, and that line of credit is given him on the basis of the financial strength of his financial statement rather than on the basis of security that is offered for the loan.

Q. I see. Assuming that, uh, a corporation had a $16,000 deficit and that it had land potential available in the period of 1959, 1960 and '61 to your knowledge, would a corporation with a deficit of that nature have been able to obtain a one hundred per cent

(Vol. X, p. 32)

land acquisition and development loan—uh, money, rather, from any normal lending institution or sources?

A. Well, of course, you'd have to study the situation to see what caused the deficit. Some deficits are a book transaction and others are not, but if it was an operating deficit, obviously coming from the operation of his business, I would not consider the loan in the first place.

Q. Any loans to corporations during this period of time which, uh, which corporations had a deficit or were of low capital, would these require personal guarantees by the stockholder or stockholders if loans were to be made to them?

A. The matter of personal guaranty is not a set procedure. In most case, uh, I can only, of course, attest to our operation—in most cases, if we have a builder who has a definite performance behind him that we think is good, we may overlook the—we may not require the personal endorsement.

In most cases, if we think that the builder does not have a sufficient record, or there is something about the project that, uh, is a little bit questionable, we would require personal endorsement.

Q. Mr. Horn; in years subsequent to this

(Vol. X, p. 33)

period of time that we have been discussing, did your company get into making hundred per cent loans—hundred per cent land acquisition and development loans?

A. Yes, we did.

Q. And why was this, sir?

A. Well, we, uh, really, this particular case that is involved here was the start of your—of our venture into development loan business. We had, uh, many of our builders—builder customers wanted this kind of a situation, but did not want to tie themselves up with a supplier so that they were not free to purchase the material where they wanted and so, uh, they kept putting pressure on us and, uh,

to try to find—to try to go into this type of business so that, uh, they could compete with Mr. Fortner who had this type of project available.

Q. Well, was it Mr. Fortner who had the project available, or United States Steel, or—

A. Well, of course, he had, through the United States Steel Credit Corporation, yes.

Q. Now, these loans in which you have been involved in subsequent years, to the time period with which we are involved, did they, uh, have any requirement that the borrower use any particular

(Vol. X, p. 34)

supplier's materials?

A. No.

Mr. Anderson: Could I have just a couple of minutes, Your Honor?

By the Court: Well, ladies and gentlemen, we will take about ten minutes. Remember the admonition of the Court and be back in your seat in ten minutes.

(Whereupon, at about the hour of 10:20 A.M., a short recess was had, reconvening at about the hour of 10:30 A.M., and the following proceedings occurred:)

Q. (By Mr. Anderson) Just a few more questions, Mr. Horn; in this period of 1959, 1960 and '61, you told us that you looked at the initial loan papers with Mr. Fortner. To your knowledge, was there available to Fortner Enterprises, Inc., any one hundred per cent land acquisition development loans during that period?

A. I don't believe there was at that time.

Q. All right; now, how many—just approximately, commercial banks and savings banks and insurance companies and organizations of that

(Vol. X, p. 35)

nature; did Louisville Mortgage Service Company represent in 1959, 1960 and '61?

A. Oh, I'd say somewhere between fifteen and twenty.

Q. And were any of those companies making one hundred per cent land acquisition and development loans during that period of time?

A. To my knowledge, no. Certainly, they didn't permit us to do it.

Q. All right. Were there any business risks involved in hundred per cent land acquisition and development loans?

A. Of course, there is business risks involved in any loan we make and more—more so by the larger percentage loans. In other words, the larger percentage of the loans in relation to the value, why, the more risk that's involved and, of course, if you go a hundred per cent loan, you're taking the greatest risk.

Q. Did this have any bearing on such loans not being available as you have told us about during this period of time?

Mr. Reutlinger: Well now, Your Honor please; first, the question is leading, and

(Vol. X, p. 36)

secondly, if I recall the witness, he says, "to my knowledge", and "don't believe". He didn't say, "no, sir", so there is two objections to the question.

By the Court: Well, just come up here, gentlemen.

(Counsel approached the bench at this point.)

Mr. Reutlinger: At the first, it's leading the witness. Of course, there's an objection in itself. My notes show that he said, "to my knowledge", and then with reference to hundred per cent land acquisition, he said, "I don't believe", so he never said no, or there was not. He always prefaced it with, "to my knowledge", or "I don't believe." The question is couched as if he had made an absolute statement of fact, in addition to the leading.

Mr. Anderson: He has qualified that, just as Mr. Dobbins did. He started out his testimony with the statement that there was not available, to his knowledge, and that he, if there had been he was sure he would have known about it. The Court will recall the answer to my earlier questions.

By the Court: As I recall,

(Vol. X, p. 37)

to a question like this, it was that he did.

Mr. Reutlinger: That was later, Judge.

Mr. Anderson: That was later.

By the Court: Subsequent to this.

Mr. Reutlinger: Well, now I just object to the question because it's leading.

By the Court: I'm going to sustain it on that ground. I think you've got to get it where it isn't leading.

Mr. Anderson: All right.

(Counsel return to counsel tables at this point.)

Q. (By Mr. Anderson:) Do you know whether or not business risks had anything to do with one hundred per cent land acquisition and development loans not being made in the period of 1959, '60 and '61?

A. Sir, this was one reason why we were not making them; uh, I can't read the minds of my competitors and know what goes through their minds, but I would certainly feel sure that, uh, the amount of risk involved is one reason that they would not go

(Vol. X, p. 38)

into it.

Mr. Anderson: All right, sir; anything else?

Mr. Hamilton: No.

Mr. Anderson: Thank you, sir.

CROSS-EXAMINATION

By Mr. Reutlinger:

Q. Mr. Horn, prior to 1959, had you had some business associations with Mr. Fortner, or one of his corporations?

A. I'm sure that I did, yes.

Q. Yes; and I believe that early in 1959, some time around the latter part of January or the early part of February of that year, you and Mr. Fortner and Mr. Sam Steinfeld had a meeting with the U. S. Steel Homes Credit people about the proposal made to him and the financing, generally; do you recall that?

A. I don't—uh, that was mentioned to me previously, but I don't recall it. It could have happened. I don't—

Q. (Interrupting) Well, you have no independent recollection?

(Vol. X, p. 39)

A. That's right; I—

Q. (Interrupting) Did you make any notes or memoranda concerning this particular transaction, this Golden Meadows, Fortner thing?

A. No.

Q. What was the position of the Louisville Mortgage Service in this Golden Meadows transaction; what function would you all serve?

A. Uh, as I recall, we had been doing some financing for Mr. Fortner's real estate firm and he was proposing to build some houses and, of course, we were talking to him about getting the financing on those and, uh, he told us about this, uh, project that he had been—uh, had been offered to him by the United States Steel Credit Corporation.

Q. Let me interrupt you there to ask you what did he tell you about the financing?

A. You mean the financing they had offered?

Q. Yes.

A. Uh, well, I think, uh—

Q. (Interrupting) Your best recollection.

A. My best recollection, uh, he gave me the paper to review.

(Vol. X, p. 40)

Q. The proposed loan agreement and so forth?

A. Yes; we had worked very closely together in our business dealings and I presume, uh, he had come—he had confidence in me to give him the information, or my unbiased opinion of the contract. I don't know why he asked me, but I—

Q. (Interrupting) Well, you worked with him before?

A. That's right.

Q. And the Louisville Mortgage Service is well known around here and has been?

A. I hope so.

Q. Hope so. What I'm looking for are copies of that loan agreement.

Mr. Anderson: Right here.

Q. But independent of the loan agreement did he tell you the general, broad outline of what he expected to obtain by way of financing?

A. It's very difficult to remember, uh—

Q. (Interrupting) Well, I—

A. (Continuing)—nine or ten years back what the conversation was.

Q. I appreciate that.

(Vol. X, p. 41)

A. And I would rather not answer that because I don't believe I could truthfully answer it.

Q. Well, here is a loan agreement. I'm not going to burden you with looking all through it, although of course, you are privileged to do so, but I'll show you the pertinent

part for our purpose, which is the—Part C, Section (1), and ask if this isn't the conventional or normal eighty per cent F.H.A. financing terms and you are referring to Defendant's Exhibit Seven.

Mr. Anderson: Terms for construction money?

Mr. Reutlinger: No, general terms; that's this part of the contract, C-(1); it's got everything in it. I'll talk about that in a moment.

Q. Those things in the back, it refers to, Mr. Horn, are stuff in the back.

(Witness examines the document at this point.)

A. You want to restate your question?

Q. Yes, I will. I'm asking if the portion of Defendant's Exhibit Seven which you are working with, which is Part (C), Section (1), isn't a

(Vol. X, p. 42)

standard, or, rather, normal provision for the eighty per cent F. H. A. financing in a project of this type?

A. This appears to me to have more reference, uh, to how the note was to be repaid rather than—

Q. (Interrupting) Maybe I've got the wrong—how much does it say they will advance under this section to Mr. Fortner, for example, or Fortner Enterprises? Just that Part (1); of course, you are privileged to read it all, but I'm referring to the amount of the advance Fortner Enterprises can expect?

A. Of course, it's difficult to tie in these things without, uh—

Q. (Interrupting) Well, maybe I can help you some, Mr. Horn. I'll read another one.

Mr. Anderson: If the Court please; the document does speak for itself.

By the Court: Mr. Horn, would you like some time to read that document?

Mr. Reutlinger: He can have all the time he wants.

The Witness: Well, it won't take me long here.

(Vol. X, p. 43)

By the Court: Sir?

The Witness: It won't take me long here; just a moment to try to tie it in to the rest of it because it gives reference to exhibits.

Q. They are in the back, you'll find.

A. Now, this paragraph has nothing to do whatsoever with F.H.A. loans. This paragraph has to do with how the construction money is to be disbursed.

Q. Advanced?

A. That's right.

Q. Put out. Well, that's what I'm saying.

A. Yes.

Q. But isn't this a standard procedure or form found in other projects which are F.H.A. financed?

A. No, I think you are confusing here construction money—you see, the F.H.A. have nothing to do whatsoever with the construction funds. That's an independent—

Q. (Interrupting) But I mean—

Mr. Anderson: (Interrupting) May it please the Court, could Mr. Reutlinger please let the witness finish answering?

(Vol. X, p. 44)

By the Court: Yes, let him finish his answer, Mr. Reutlinger.

The Witness: This is something that ought to be cleared up.

Q. All right.

A. So many people feel that the construction loan is part of an F.H.A. loan, and that's not the case.

Q. Well, the F.H.A. is a subsequent loan.

A. Is the final loan.

Q. I understand that, but—

A. (Interrupting) What we are talking about here in Part (C), Section (1), I presume, uh, it appears to me that it is—is how the construction money is to be advanced as the house—

Q. (Interrupting) I'm sorry. I see where you and I are confused and I think the confusion is understandable. I realize that the F.H.A. is the final, ultimate loan.

A. That's right.

Q. However, this particular—I'll ask you this question; isn't that particular language in the contract before you standard, or normal language in other projects which have ultimately, F.H.A. financ-

(Vol. X, p. 45)

ing?

A. Well, there is no standard.

Q. I realize that.

A. This is all right. Uh, very few of 'em are—uh, I've never seen many this way except, uh, a company that operates on a national basis; they try to standardize their contracts.

Q. Well, let's put it to you this way; on the basis of this particular Section, Part (C), Paragraph (1), of Defendant's Exhibit Seven, what would Fortner Enterprises expect to be advanced in percentage, by way of construction money?

A. It would appear here that eighty-five per cent of the valuation of the particular house—

Q. (Interrupting) And that's overall valuation?

A. That's the overall valuation; house and lot.

Q. House and lot; that's right.

A. Yes.

Q. And, of course, they make reference to that it is less the value of the lot, which was set and calculated in

column two of Exhibit (B), which you will find at the back of that; that's an accurate state-

(Vol. X, p. 46)

ment, isn't it?

A. Will you restate that; that's—that it is less—

Q. (Interrupting) Less the amount of the lot allocated in a chart found at the back end of the contract.

A. I don't want to try to place an interpretation on what you were referring to.

Q. Well, we will do it very slowly.

A. The normal—normal way is where there is a development loan note outstanding, as this case—

Q. (Interrupting) Was; that's right.

A. (Continuing)—that a portion of that—that applied to the particular lot that is being—that is getting a construction loan would be released from the original note; that's the normal procedure.

Q. Or take care of in some manner?

A. That's right.

Q. Well, I'll put it to you this way then, which I think will serve both of our purposes and shorten this particular aspect of it; if, and in this case, Fortner Enterprises had borrowed money to buy and

(Vol. X, p. 47)

develop the lot, the lot—the amount of that would be accounted for, or deleted from, since he had already borrowed it, from any appraisal or allocation of construction money when you value the property. Have I phrased that correctly?

A. I think I know what you mean.

Q. All right; you tell me.

A. In other words, when the ultimate construction loan is made—

Q. (Interrupting) Yes.

A. (Continuing)—the, uh, note—the part of the original note on the development loan that applied to that lot—

Q. (Interrupting) Yes.

A. (Continuing)—is released and paid and the note is reduced by that amount.

Q. All right; the construction money note is—

A. (Interrupting) Through the construction money.

Q. Yes. Well, but in this case, it's all one lender so they simply allocate it as it says here, "for the purpose of allocating the proceeds—", that's the amount of money going—that he's going to

(Vol. X, p. 48)

get, "from the construction loan, to be advanced to borrower", that's Fortner, "the maximum amount of such proceeds to be allocated to each proposed lot covered by the agreement, shall be as to each such lot, whichever amount is lesser, of either that amount set forth in column three on Exhibit (B), or that amount arrived at by subcontracting the pro rata share of the proceeds of the land note for each of the sub lots from eighty-five per cent of the value of the particular lot established by the F.H.A. commitment or the V. A. certificate."

Now, Mr. Horn, isn't that—isn't what that language is saying to you, and you've been in the field for a long time—

Mr. Anderson: (Interrupting) May it please the Court; again I object; the document speaks for itself.

By the Court: Overruled.

Q. That first, you have a construction money loan in contemplation, haven't you? That's what we're talking about here.

A. Right.

Q. And they tell him that he can borrow eighty-five per cent of the value of the property based

(Vol. X, p. 49)

on an appraisal with the top limit as they point out. That's what it starts with, expecting, doesn't it?

A. Right.

Q. Then they also tell him, because you and I both know in this transaction that he's already borrowed money to buy and develop the land, which is included in this eighty five per cent value, isn't it?

A. That's right.

Q. I'll put a line and "included", that he must, as they say it, "subtract the pro rata share of the proceeds of the land note allocated to the lot", as shown on the Exhibit (B), which in yours I don't know what the figure is given, but it looks somewhere around seventeen or eighteen hundred. Are you looking at Exhibit (B) behind there?

A. No, I'm trying to fathom what—as he's reading along here, I'm trying to—

Q. (Interrupting) Take all the time you want.

A. (Continuing)—to see what I understand because there are some terms in here that I'm not sure I know what you're talking about; sub lot, for instance.

(Vol. X, p. 50)

Q. Well, that's just a lot, as opposed to a big tract. That has no significance for the purpose of this unless you think so.

Mr. Anderson: Again, Your Honor, we would object to this line of questioning. This is not a subject matter which we brought up on direct examination. Mr. Reutlinger is leading the witness and so we object on that basis as well as on the grounds we have previously stated, that the document, to the extent that anybody can understand it, speaks for itself.

By the Court: Overruled. He is here as an expert and

has testified about hundred per cent loans and I want to hear him.

Q. Go ahead, Mr. Horn.

A. Well, let me say this; I think I rather object myself to have to try to put an interpretation on this because I'm not a lawyer; I'm a banker.

Q. I—this has nothing to do with the law.

A. We are talking about different types of loans and to ask me what you meant by a certain—

By the Court: (Interrupting)

(Vol. X, p. 51)

Well now, Mr. Horn, didn't you meet with Mr. Fortner and didn't he submit this to you before he entered into this transaction and asked your advice about it?

The Witness: Yes, but those things, Judge, are, uh—you gave 'em your advice after you let your attorney check it. I don't try to be an attorney on these things.

By the Court: Well, this—you gave some advice about it though, didn't you?

The Witness: As to the desirability of it.

By the Court: Well, in arriving at desirability didn't you have to figure what was tendered in it in the way of the right to draw down money and the right to credit?

The Wtiness: Yes, but the question is not how much. I have agreed on the eighty-five per cent.

Q. (By Mr. Reutlinger) Yes.

A. He's asking me how to interpret the language that's in the—in this paragraph and that's what I'm objecting to.

Q. Let me clear all this up then.

A. I'm not sure I understand the way some

(Vol. X, p. 52)

of it is written.

Q. All right; let's leave it right like it is on the board then, Mr. Horn. You and I both know that he's expecting

to, at the moment, draw on construction money, as you say, eighty-five per cent of the value of the property which includes land. Now, he can expect that, so far, can't he?

A. That's right.

Q. Now, assume that he is—he's already borrowed the money to buy the land. Is it your belief that under this contract, having borrowed—let's see; what is that figure you have there in that column (B); make sure its accurate?

A. $1,720.00.

Q. And, uh, he borrowed $1,720 to buy the land, and just for the sake of convenience, let's assume that the appraised value is $10,000—we—would he expect, having earlier borrowed eighteen—I want you to pay very careful attention to this, Mr. Horn—having earlier borrowed $1,720 to buy the land—assume that the value of the whole, land included, is $10,000.

Mr. Anderson: Objection to that assumption, Your Honor. There is no—

(Vol. X, p. 53)

Mr. Reutlinger: (Interrupting) This is my basis of illustration.

By the Court: Overruled.

Q. Could this Fortner Enterprises then after having borrowed the $1,720 earlier to buy the land, expect to be—to obtain another $8,500, or would he have to account for this either by repaying it or by reducing this $8,500 draw? Would one or the other have to be true?

A. Now, where is the $8,500 draw coming from?

Q. All right; I'll go through this one more time very slowly because when, uh, I was asking you I think you were reading.

We have established that the basis for the appraisal of $8,500—rather of eighty-five per cent included the land; that's true, isn't it?

A. Right.

Q. We have already—or, you may assume that he has earlier borrowed $1,720 to buy the land.

A. That is part of the overall mortgage.

Q. That's right.

A. That's the part allocated to this lot.

Q. That's right; this lot.

(Vol. X, p. 54)

A. That's right.

Q. For the sake of illustration only, assume that in this particular house and lot the value is $10,000, so that when completed, he could borrow $8,500; that's a percentage.

A. That's right.

Q. $8,500. Could he expect, in addition to the $1,720, to buy the land that he earlier borrowed to obtain another $8,500, or would he either have to, from this $8,500 land value—land and improvement value loan, repay this money, or have this loan reduced by that amount?

A. Well, again, you're asking me to interpret this as to what he meant in this paragraph.

Q. I'm asking you what he could—would expect.

A. I refused to do it, but under normal circumstances, he would be expected to, out of the $8,500, pay the $1,720.

Q. Well then, you'd just take this away for his construction money, wouldn't you?

A. Take it out.

Q. Take it out of his construction money.

A. That's right.

(Vol. X, p. 55)

Q. But his construction money would be reduced by that figure, assuming the figure is correct?

A. (Witness nodded head affirmatively.)

Q. Now, when we look at this contract it simply says,

as I recall it, about the one, two, three, four, five, sixth line, it says:

"By subtracting the pro rata share of the proceeds of the land note allocated—"

doesn't it?

A. Uh huh.

Q. Well, subtract is take away, isn't it?

A. That's right.

Q. Well then, this contract says just about what we have been going over on the board, doesn't it?

A. Yes, I think it does.

Q. All right. Do you recall how many meetings you did attend with Mr. Fortner and the Steel people before this contract was signed, which was in October of 1960?

A. No, I don't.

Q. I believe at the same time you signed some contracts directly with the Steel people?

A. It seems to me they required us to sign

(Vol. X, p. 56)

something. I don't—I don't have a copy.

Q. You were part of the transaction?

A. I was.

Q. In the transaction?

A. In the transaction kind of as an observer because we were ultimately going to make the final loan. We joined into it because U. S. Steel wanted to know where the final money was coming from; to that extent, we were the—

Q. (Interrupting) If no one finally gets a loan to buy it, why there's no point in the project is there?

A. No point in the project.

Q. And this is the particular function, or, was the particular function of the Louisville Mortgage Service?

A. That's right.

Q. In this transaction?

A. That's right.

Q. During the time—and let's assume the negotiations were going on late in 1959 and down through October of 1960, did Mr. Fortner or anyone from Fortner Enterprises ask you to make an inquiry as to whether or not there was a hundred per cent land

(Vol. X, p. 57)

acquisition and development loan available?

A. No, I think, uh, I—uh, probably expressed the fact that, uh, I was upset that I might be losing some of Mr. Fortner's business and he incidentally said—he said, "Well, if you can do something like this I'd just as soon stay with you", or something to that effect, in a casual remark.

Q. Yes, but did you make any inquiry?

A. As to—

Q. (Interrupting) The availability of such?

A. Availability?

Q. Yes.

A. No.

Q. Do you recall making an affidavit for use in this litigation?

A. Yes.

Q. Have you had a chance to review that affidavit?

A. Yes.

Q. Recently?

A. Uh huh.

Q. I don't want to take you by—don't want to read it to you and you not have it.

(Vol. X, p. 58)

A. No, I read it.

Q. All right; yes, sir. The first paragraph is virtually—is a preamble and says virtually what you have said earlier about your experience in the business.

A. Uh huh.

Q. And the second is repeative in a sense that says that you are familiar with types of financing, and then you say that the type financing involved in the transaction was unusual and unique.

A. Uh huh.

Q. And here you say in the second sentence that such financing plan was not available to Fortner Enterprises or any other potential borrower from or through Louisville Mortgage Service Company or from or through any other lending institution or mortgage company to this affiant's knowledge during that period.

Well, you qualified that by adding, "to your knowledge", didn't you?

A. That's right. You can't make a categorical statement that there weren't any available because I don't think anyone could make a statement like that. We don't know what every company is doing. We know generally, by virtue of what our customers tell

(Vol. X, p. 59)

us and that's how we learn these things.

Q. Yes, I realize that. Then,

> "Affiant states that as a result of this type of financial assistance give by the U. S. Steel Homes Credit Corporation—"

and I assume there you are referring to this that we have just discussed?

A. Right.

Q. "and others, or given to the Fortner Enterprises and others, and somewhat similar assistance given by a few prefabricated home manufacturers or their affiliates—affiliated companies in 1963 and subsequent years—"

and it's grammatically incorrect because you've got a sentence there and it doesn't make sense. I think a comma

might be better and it might be a misprint. First, what were the other prefabricated home manufacturers that you had reference to when you made this affidavit?

A. Uh, I think National Homes at that time.

(Vol. X, p. 60)

Q. Well, that's the biggest one in the industry, isn't it?

A. I presume they are; I'm not sure. We are talking about at that time; they were, I'm pretty sure.

Q. All right. Well, I'm talking about at that time, of course. What were some of the others you had in mind?

A. Gee; again, I'm trying to remember which companies were in existence ten years ago.

Q Harnishfaeger funning a—

A. Uh huh, Harnishfaeger; that was P & H Homes; I believe Best Homes were in existence at that time.

Q. Inland?

A. I'm not sure whether Inland was there.

Q. Well, what was National Homes doing about that time regarding financing?

A. To my knowledge they had not offered anything like this in this area. I wasn't aware of any, but—

Q. (Interrupting) You didn't call up National and make any inquiry from them though, did you?

(Vol. X, p. 61)

A. Well, you see, that again was this tie-in kind of a deal. You don't call—

Q. (Interrupting) I understand, but my question was, did you call?

Mr. Anderson: May it please the Court; he hadn't finished his answer and Mr. Reutlinger interrupted him.

The Witness: What would I call them above?

Q. To see what financing they had available; that was my question.

A. To see what financing they had available for Mr. Fortner?

Q. Yes, sir.

A. Well, I wasn't appointed by Mr. Fortner to—

Q. (Interrupting) I—Mr. Horn, you misunderstand my question. I didn't say you were appointed. My question simply was did you do such an act?

A. Your question seemed too ridiculous to me, but I'll say no.

Q. That's—let me be the judge of what I am trying to prove, Mr. Horn, if you don't mind.

(Vol. X, p. 62)

A. All right; all right.

Q. And, similarly, I assume you made no inquiry of other prefabricated home manufacturers? You did not—

A. (Interrupting) I didn't get on the phone and call 'em, no.

Q. You didn't write 'em?

A. Or write them, no.

Q. You didn't communicate with them in any way?

A. No; you don't get all your knowledge by doing it that way.

Q. Mr. Horn, I realize that, and you are perfectly at liberty to qualify your answer after—

A. (Interrupting) Well, I feel you are protesting my—what I said in that statement; that, uh, I hadn't made the proper investigation to make that statement and that isn't true. I mean—

Q. (Interrupting) I didn't make the statement, Mr. Horn.

A. All right.

Q. This is your affidavit I'm reading.

A. That's right.

Q. All right. Then, you say in this

(Vol. X, p. 63)

affidavit that the Louisville Mortgage Service Company and other organizations have been forced to offer their customers similar one hundred per cent financing for purchase and development of land.

Now, first, what were the other organizations who were compelled to get into this hundred per cent financing field to which you made reference in this affidavit?

A. Building & Loan associations.

Q. What others?

A. Building & Loan Associations.

Q. Just—no others?

A. No others.

Q. How about suppliers; you mentioned that in your direct testimony.

A. Well, we were talking here about the lenders.

Q. Well, anyone that lends money is a lender in a sense, aren't they?

A. That's right.

Q. Would a products supplier such as Boland-Maloney make loans to builders?

A. Not to my knowledge.

Q. Not to your knowledge. Any other

(Vol. X, p. 64)

products—

A. (Interrupting) I was talking about development loaning, now.

Q. Well, any loans first.

A. Yeah.

Q. Would Boland-Maloney?

A. Well, I presume Boland-Maloney would make some little loans here and there to builders for odd purposes; general development loans I wouldn't think they would.

Q. Well, I would tend to agree with you as a general

matter, but it's—certainly, they are at liberty to do that, aren't they?

A. They are at liberty to do it.

Q. And to your knowledge in some instances, you said, made a loan or two for some purposes to builders?

A. Some purposes, yes.

Q. The hundred per cent financing which you are operating here as for the—as a mortgage broker as agent for other lending institutions you represent—

A. (Interrupting) Right.

Q. What were some of those that actually went to the hunderd per cent land acquisition financing?

(Vol. X, p. 65)

A. None of them, to my knowledge. I mean, later in—

Q. (Interrupting) Well, that's what you said, forced to offer their customers similar one hundred per cent financing for purchase and development of land.

A. Well now, you are talking about lending institutions here in Louisville. I was talking about—

Q. (Interrupting) I'm sory; let's straighten that out. I'm reading again from your affidavit:

> "Louisville Mortgage Service Company and other such organizations"

and I assume you are making reference there to—

A. (Interrupting) To mortgage companies.

Q. "Mortgage companies have been forced to offer their customers similar one hundred per cent financing for purchase and development of land."

Let me ask this question; first, it's my understanding from this affidavit that Louisville Mortgage Service Company actually did, at a later time, offer one hundred per cent financing for purchase and development of

(Vol. X, p. 66)

land?

A. That's correct.

Q. And did you do that as an individual company or were you acting as a broker?

A. As an individual company.

Q. All right. Did you, in turn, borrow money from Prudential, for example?

A. No.

Q. You had your own capital to do this?

A. Own capital.

Q. What were some of the other organizations which did this?

A. You mean other mortgage Companies?

Q. Yes, sir; that you had reference to?

A. Uh, ce Company in Louisville, here, and, uh, the Kentucky Mortgage Company.

Q. When did you start this practice, best judgment—I'm not trying to find out—to pin you down to—

A. (Interrupting) I tried to find out. I had—this goes back —

Q. (Continuing)—to last Thursday at two o'clock.

A. But, we started making, as best as I

(Vol. X, p. 67)

could find in our records, uh, the first one was in 1962.

Q. You recall what period of '62?

A. Uh, in July.

Q. To whom was that loan made?

A. To the Associated Developers.

Q. Who were the people behind that?

A. The people behind it are both dead. They were the Pascal brothers.

Q. Did you have any requirement or understanding when you made these hundred per cent loans that the builder or the developer would make best efforts, or insure that the permanent financing would be handled through your office and the companies you represented?

A. No, we did this; we had a—we called it just a gentleman's agreement that, uh—

Q. (Interrupting) You would get the permanent financing?

A. We would get the permanent, because that was all one package deal.

Q. Well, what you're saying then, I assume, is that when they made the construction loan it was all—that ended up by being the permanent

(Vol. X, p. 68)

financing with adjustments as you went along?

A. No, no, no.

Q. You said package.

A. There were three distinct loans in this thing.

Q. I see.

A. You have a development loan for the land development and that is separate from any other loan.

Q. All right.

A. Now, our construction loans are handled differently than they did this. Number, because you need more flexibility, uh, to set a particular price on a house.

Q. Uh huh.

A. When you haven't determined the market.

Q. Uh huh.

A. This is very difficult to do and this arrangement here, uh, the construction loan is based on an assumed F.H.A. valuation.

Q. Uh huh.

A. Now, that makes it very difficult to operate on that basis because it may be that sales conditions require you to change the house in some way

(Vol. X, p. 69)

and, in changing it, you alter the sale price and therefore, uh, it requires more money or in some cases, less money.

Q. It depends upon the market for the house.

A. Depends on the market for it.

Q. Yeah.

A. So, construction loans are—the amount to the construction loan in our case is not determined until they get to building the houses and then they are, uh, judged on that basis on valuation.

Now, that's the second step.

Q. Second.

A. Now, that's a separate loan from the first one.

Q. Uh huh.

A. The third one is the final loan when it is sold. Now, uh, the third one, uh, the borrower is given the choice of where he can go. We do not say, "you must come to us". We tell the developer and builder who, in most cases, are the same, that, "We expect him to, in the absence of a preference, to send that man to us", providing our rates are comparable.

(Vol. X, p. 70)

Q. Uh huh.

A. If he can get a better deal some way, he is not obligated to come to us.

Q. Now, what—you say there is a gentleman's agreementon the package. Was this ever reduced to writing in any of your transactions?

A. Uh, yes, that, uh, in later years, yes, sir.

Q. What would be the nature, in broad outline? I'm not trying to ask you to quote the language, but what would you put in the contract?

A. Virtually what I have said, that we expect them to refer the people to us and, uh, that our rates, if they were comparable with any of the other ones, why, we expect them to come.

Q. Well now, of course money is a broad-based market, uh, broad-based commodity, so the rates are usually the same, aren't they?

A. Same, yeah.

Q. So that you had no real competitive advantage in money rates because everybody starts with prime?

A. Well, of course, there is competitive rates in, uh, mortgages. It's rather involved. Of

(Vol. X, p. 71)

course, the F.H.A. set up is based on an interest rate that is established by Congress. There is no change to that—there wasn't at that time.

Q. You're anticipating me a little bit. When you get into F.H.A. those rates are established?

A. That's right; the rate, the interest rate.

Q. That's what I'm speaking of.

A. But then money began to dry up a little bit because the rate was fixed by Congress and it was not competitive with rates—other rates on other types of loans.

So, the F.H.A. devised the system of allowing discounts to be paid by the seller. Now, there is where there was a difference. One company may require heavier discount than another one.

Q. This—you could compete with altered discounts?

A. That's right.

Q. Well, let's put it this way and see if you understand—if I understand the testimony correctly in this particular sphere of your testimony. You made a hundred per cent financing and purchase and development of land loans in 1962?

(Vol. X, p. 72)

A. Right.

Q. And at that time you had a gentleman's agreement, as you say, with the builder-developer to use his best efforts to insure that you or your companies that you represent got one hundred per cent—got the long-term financing?

A. Right.

Q. And I believe you said there was what you called a package deal?

A. That's right.

Q. And that at a later time you reduced this gentleman's agreement to writing and embodied it in the contract on the construction and land loans?

A. In later years.

Q. In later years.

A. On newer loans.

Q. Oh, yes; I'm not speaking—

A. (Interrupting) Not on the original loans.

Q. Yes. Now, in F.H.A. and ultimate F.H.A. financing, don't you have some nature of control over a project in that if a man wants to go F.H.A. and then he goes right direct to builder-dealer, as here, to Louisville Mortgage, for example?

(Vol. X, p. 73)

A. Well, the procedure was, a builder, when he went to build a house, had to get what was known as an F.H.A. conditional commitment. That commitment told the builder what ultimately, a purchaser could get on that particular house if it is built according to the plans and specifications which they have approved and which they later inspect.

Q. Uh huh.

A. That, of course, involves some inspections of the house as it goes along by the F.H.A. Now, the company that is in possession of that commitment is usually the company that makes the permanent loan and, quite naturally, if you are going to get construction money, almost every lender requires you to get these F.H.A. commitments before they will grant you, because that's the protection they need to assure that the house, when it is finished, has all types of financing available to it.

Q. And this of course, is then within the complete control of the lender who has the commitment, F.H.A.?

A. Uh, the commitment is in the control of the lender; it is.

Q. That's right.

(Vol. X, p. 74)

A. Yes.

Q. Now, the commitment that the lender makes and Louisville Mortgage Service Company would be a lender, wouldn't it?

A. Right.

Q. The commitment that the lender makes to a project, an F.H.A. project, is for, if you chose, land acquisition, if you chose construction money, and obviously because there is where you make your long-term investment, in the permanent lending; that's correct, isn't it?

A. Yes.

Q. And in an F.H.A. project in which you have advanced any money, you then could control the ultimate disposition of the permanent financing couldn't you?

A. Well, you have limited control of it. Of course, these things are assignable.

Q. Wel, you can sell anything.

A. No, they are not sold; they are transferrable.

Q. Yes. Well, you don't have to transfer 'em unless you choose, do you?

A. Well, you don't have to but—

(Vol. X, p. 75)

Q. (Interrupting) You can.

A. (Continuing)—it's a matter of policy, yes.

Q. But you are not compelled to sell anything you don't want to sell?

A. No, but the purpose of getting these commitments is not to control. Let me say this; there is no such thing as an F.H.A. project.

Q. I'm using the word broadly.

A. Uh huh.

Q. Ultimately, you know that in this particular project some of those homes were financed, not through F.H.A.

A. The name usually comes from the fact that most of the financing ultimately goes through there.

Q. That's what I mean, yes.

A. But there is no such thing as an F.H.A. Project that we are talking about.

Q. I'm aware of that.

A. It's another type of financing.

Q. Well, I was trying to find out, and I think you will agree with me, in a project such as Golden Meadows, in which the houses were F.H.A.

(Vol. X, p. 76)

approved—

A. (Interrupting) Uh huh.

Q. (Continuing)—while the buyer is not compelled to borrow money under the F.H.A. terms, if the buyer does, then he follows the commitment that you, the lender, the lending institution, have made, doesn't he?

A. Yes.

Q. Now, similarly, in any other project in which you have loaned money as you indicate you did in 1962 and which would be similar to this Golden Meadows in that it had basic F.H.A. approval and F.H.A. loans available to, or to the purchasers, you then would control, if the house went F.H.A., the ultimate loan, term loan, to you or your companies you represent, wouldn't you?

A. If I was competitive, yes.

Q. Yes, and—well, you have already made the commitment. They have no choice if it's F.H.A. do they?

A. No, we don't make the commitment.

Q. Well now, I misunderstood you.

A. No, on the permanent financing, why, we do.

(Vol. X, p. 77)

Q. Yes, sir. All right, sir; changing the subject abruptly, Mr. Horn, do you recall the foreclosure sale—the sale when Golden Meadows was sold over at the Jefferson County Courthouse?

A. I certainly do.

Q. You attended?

A. I attended.

Q. You bid?

A. I didn't bid.

Q. You—you physically, bid?

A. No, I did not.

Q. You did not make any bids there?

A. No.

Q. Are you certain of that?

A. I am certain of that. We agreed with a builder who did the bidding.

Q. Well, you might be—but, I mean—

A. (Interrupting) You talked about me, physically.

Q. Well, but did you open your mouth?

A. I didn't open my mouth in giving a bid.

Q. Yes, well, I don't mean that you, the Louisville Mortgage Service was bidding necessarily;

(Vol. X, p. 78)

for yourself; I'll come to that, but you made—you, Mr. Ed Horn, actually made some bids there?

A. No.

Q. You did not open your mouth at that sale?

A. I'm not going to say I didn't open my mouth at the sale, but I didn't open my mouth to make a bid.

Q. I see.

A. I could tell you what I did.

Q. All right; fine.

A. So that we can clear this thing up.

Q. Yes.

A. A builder we were doing business with recognized that this was a good area in which to build houses.

Q. Uh huh.

A. And he, uh, said he would like to buy these lots.

Q. Uh huh.

A. At the sale.

Q. Uh huh.

A. If he got 'em at the right price.

Q. Uh huh.

(Vol. X, p. 79)

A. He came to us for the financing on the thing if he were able to buy the lots.

Q. Buy the lots.

A. We told him that we would go as high as a certain figure. I don't recall what it was.

Q. Makes no difference.

A. Then, if he could get 'em for that price, that we would lend him the money to buy 'em; pay this thing off. He was not the successful bidder.

Q. No, I realize that; I understand that.

A. No.

Q. Who was the successful—who was that builder?

A. He was operating in the name of the corporation, uh, at that time, uh, I can't think of the name of it.

Q. What was the man's name?

A. It was—it was Herman Miles.

Q. Would it be Crescent—uh Crestwood Homes?

A. It could have been. I don't—

Q. Apex, maybe?

A. Apex, I believe, was the one. I'm not sure.

(Vol. X, p. 80)

Q. Well, let's put it this way—

A. (Interrupting) It's one of those two corporations.

Q. Yes, well, I say it's of small moment. Well, this reason I was so insistent, I think you did have—you did

give an explanation and it was my impression you were physically making a bid.

A. (Witness Shook Head Negatively at This Point.)

Q. I seem to recall it; you were there, of course?

A. I was there.

Q. You know that; and you were there with Mr. Miles?

A. Strictly on behalf of Herman Miles.

Q. Certainly not trying to put the Bee on you.

A. Yes.

Q. Mr. Fortner was there also wasn't he, standing beside you most of the time; not unusual; it was his property.

A. I can't remember, but I presume—I wouldn't see any reason why he wouldn't be there.

Q. No. Well, suffice is to say that Mr.

(Vol. X, p. 81)

Miles discussed with you the possibility of buying these lots at the foreclosure sale?

A. (Witness Nodded Head Affirmatively.)

Q. And regardless of my memory or yours and through, perhaps one or the other of these corporations, Crestwood Homes, or Apex Homes, which we know were the unsuccessful bidders?

A. Uh huh.

Q. The Miles interests, Herman Miles, did place bids on this property at the foreclosure sale?

A. Yes.

Q. One more thing, Mr. Horn, and I'll turn you loose. The closing sheets here, some of them, show that, and they are all here in evidence and we won't take up a lot of them, but most of them have the lot numbers on them.

For example;—can't find the lot number. Makes no difference. Oh, yes, there's a lot number there, (indicating). There is Lot 28. Now, I direct your attention to the pink closing sheet for Lot 28.

A. Uh huh.

Q. And of course, it gives the overall site price of $16,600, and then it shows a disbursement

(Vol. X, p. 82)

there and, in two instances, it shows Louisville Mortgage Service, and in this particular closing sheet it took a discount fee of $316.00 and that's that discount fee I spoke about earlier?

A. Uh huh; I presume that that is what that was.

Q. It certainly went to the Louisville Mortgage Service Company?

A. Right.

Q. And at the bottom line, Louisville Mortgage Company closing costs, $305.46?

A. Uh huh.

Q. And that went to the Louisville Mortgage Service Company?

A. Right.

Q. Out of the overall sale price?

A. Yes.

Q. Pick one more at random; this one, I believe, deals with Lot No. 61?

A. Yes.

Q. And this shows that the Louisville Mortgage Service Company took a discount fee of $620.00?

A. Right.

(Vol. X, p. 83)

Q. The escrow, that's just held, so that's not yours; and the Louisville Mortgage Service Company had closing costs of $341.12?

A. That's right.

Q. All of that comes out of the purchase price?

A. Right.

Q. Did you, Mr. Horn, through the Louisville Mort-

gage Service Company, on lot 205, Golden Meadows, and Lot 271, Golden Meadows, make a commitment to the Fortner Enterprises—now, of course, that's kind of hard to answer, isn't it?

Let me ask you this; do you recall getting a subpoena from me asking you to bring your records here?

A. I got a subpoena from you.

Q. Does it have anything on it about records?

A. Yes, uh huh, but you didn't tell me what records.

Q. I think I said all of 'em.

A. I know, but all of 'em is kind of inclusive.

Q. Yes, it is.

(Vol. X, p. 84)

A. I don't know what—we have no particular records that I could find on this transaction here that we are involved in.

Now, I don't know what other kind of records you would want.

Q. Well, I wanted—what I asked for or what I wanted was all, but if you haven't got 'em that's beside the point.

A. Well, I mean, it would take a truck to pull out all the loans.

Q. I mean, not all of your records, but your records relating to this transaction; there was a limit, I believe.

A. If you mean every loan was made in there, I'd have to bring the loan files down in a truck.

Q. A truck for just this Golden Meadows project?

A. Well, I don't believe we've got—I don't know how many thousand we financed.

Q. I didn't realize there was that much paper work involved. I'm afraid you're right. All right; I think we can do without it. Let's look at what I suggest to you is a partial release of mortgages,

(Vol. X, p. 85)

and ask you if this isn't a photostatic copy—

Mr. Anderson: If you are going to show him something, could we see it?

Mr. Reutlinger: Yes, you can see it, but unfortunately, I'm not able to introduce it as an exhibit because I didn't realize we were going to need it.

Mr. Anderson: I don't know what you're going to ask him about it. He obviously didn't prepare it.

Q. I will ask you, Mr. Horn, if that doesn't appear to be an attested copy of a partial release of a mortgage of Lot 205, Golden Meadows, Section One?

A. It does.

Q. And I believe it shows a recording stamp in the Jefferson County Courthouse of September 14th?

A. Uh huh.

Q. Of 1962?

A. (Witness Nodded Head Affirmatively.)

Q. That is correct; isn't it?

A. That's right.

Q. All right.

Mr. Reutlinger: Now, Judge, I am precluded from offering this in evidence because it was

(Vol. X, p. 86)

not on my list of exhibits and this comes as a result of earlier conversations. I would like to offer it, tendered in the Record as a supplement to this witness' testimony, obviously not an exhibit, for the technical reasons I have mentioned.

Mr. Anderson: I cannot see any relevancy nor materiality to this attempting to tender a document which Mr. Horn's signature—I can't see where he signed it or had anything to do with it. I see no relevancy or materiality to that piece of paper, Your Honor.

Mr. Reutlinger: Well, I can explain at this time. Judge, you will recall in Chambers you made some mention of,

the individual lots, if they were released one by one and mortgaged that the Court's ruling would be, as a matter of law, on the letter restrictions that we could show—wait a minute.

Mr. Anderson: Let's be heard in Chambers on this if that is what you are trying to get into.

Mr. Reutlinger: Surely.

By the Court: Ladies and gentlemen; let's take about ten minutes.

(Whereupon, at About the Hour of 11:30 A. M., an Adjournment Was Taken to Chambers Where the

(Vol. X, p. 87)

Following Proceedings Occurred:)

Mr. Anderson: If the Court please; all this document is, which was, uh, has never been designated as an exhibit for this trial, uh, is a release of the mortgage on a particular lot that was executed after this suit was filed and I had, uh, thought that Mr. Reutlinger was trying to represent to the Court before that there had been some releases of mortgages where United States Steel Homes had not been built, but I know as a fact that, uh, the U. S. Steel prefabricated package was put on that lot, 205, that he's referring to there and every other lot that's been—that is the subject of this lawsuit where a house was built and Mr. Horn did not prepare that document. There is no indication that he signed it or had anything to do with it and I—uh, certainly it is objectionable at this time.

By the Court: Well, you maintain that this is a release of a lot?

Mr. Reutlinger: Yes, sir.

By the Court: On which a U. S. Steel home had not been erected?

Mr. Reutlinger: No, sir; let me—

By the Court: And therefore, you

(Vol. X, p. 88)

get into the contemporaneous construction—

Mr. Reutlinger: (Interrupting) Let me give the Court my two-fold reason for submitting this document at this time.

First, and I preface my comments with if I could foresee the future, I wouldn't be practicing law; I'd be betting on the horses.

Uh, it never occurred to me that Mr. Anderson would again bring up the matter of the release from mortgage does not release from the restriction, but he did, and at that time, which was a few days ago, in Chambers here, I recall the Court telling me if I could show a release, lot by lot, upon payment of simply the pro rata share of the lot that as a matter of law under contemporaneous construction, a man was—restrictions did not apply.

Now, that is a reason for referring to this. I cannot ask that it be offered as an exhibit simply because I did not designate it, not anticipating. The witness, however, is certainly capable of reading into the record from the document and if counsel wants to cross examine to suggest that it is a spurious document, then maybe he can, but, I mean, it's not, but that's beside the point.

Now, by other witnesses I will show that the consideration for this release was, and I'm guessing, or

(Vol. X, p. 89)

trying to remember, $2,200, which was the pro rata share of the lot, after the release, and I'm going back now to Horn—after the release was recorded, which is why I asked him about the recording date. I show that they ordered a home, put it there, which they didn't have to do and that Mr. Horn finalized it and I think I can show that he financed it a hundred per cent.

Of course, a lot depends on what he said, but I've got

documentary evidence which is acceptable as exhibits which I obtained from Mr. Anderson prior to the trial.

By the Court: At the time of this release there was no United States Steel House on there?

Mr. Reutlinger: No, sir.

Mr. Anderson: Now, that we will have to get into, Judge.

By the Court: Well, I'm going to let you do it.

Mr. Reutlinger: I'm about to get into that.

Mr. Anderson: Because what I know is that a U. S. Steel package was put on there—

Mr. Reutlinger: Absolutely.

Mr. Anderson: (Continuing) And—

(Vol. X, p. 90)

Mr. Reutlinger: (Interrupting) No doubt of it; absolutely.

By the Court: Well if at the time this was executed, that lot had no type of a structure—

Mr. Reutlinger: (Interrupting) Well, execution has noting—let me give a little background. That—that executed—the recording—it's a recording date. They execute them in wholesale batches and turn them over to the title company.

By the Court: Well, they were recorded on the same—

Mr. Reutlinger: (Interrupting) No, sir; recorded much later. What they did is send these over to the title company and say, "When you collect in this case, $2,200, file the release", you see.

By the Court: I see.

Mr. Reutlinger: That's the gimmick, there.

By the Court: So, September was when it was paid?

Mr. Reutlinger: Yes, sir; yes, sir.

Mr. Anderson: Well, we object to anything which occurred after the date this suit was

(Vol. X, p. 91)

filed, which has already been established as July 19, 1962, on the premise that any actions that occurred thereafter by United States Steel Corporation were self-serving and not necessarily consistent with the previous conduct at all and that document, as Mr. Reutlinger points out on its face, was recorded in September.

You can serve yourself in many ways after a lawsuit is filed.

Mr. Reutlinger: Also, I want to show the Court about Mr. Horn's conduct; about a hundred per cent financing—has a direct bearing on it.

By the Court: Well, he admitted he did hundred per cent financing.

Mr. Reutlinger: Yes, but I want to show he gave Mr. Fortner a hundred per cent financing on this transaction.

Mr. Anderson: What documents are you—

Mr. Reutlinger: (Interrupting) These, (indicating).

Mr. Anderson: Well, if the Court please; the dealer purchase order shows that that house was ordered on June 5, 1962, before the lawsuit was filed. The lawsuit was filed in July and obviously, if they sent a

(Vol. X, p. 92)

purchase for it, they had a contract and an obligation to build the house.

Mr. Reutlinger: You haven't read your franchise.

Mr. Anderson: And—well, I have read the loan agreement and if they sold the man—if they had a contract with a purchaser that was dated before this lawsuit they would—they were obligated to, if they had a B-1 house or whatever it was, they had an obligation to that purchaser to build that house.

Mr. Reutlinger: That may be.

Mr. Anderson: So, they order the package before the

lawsuit is filed. Then, the lawsuit is filed and obviously they can't get construction financing out of U. S. Steel after the suit is filed, so that, uh, this transaction occurrs, but there is a U. S. Steel house on that lot.

Mr. Reutlinger: There is not. I am about to show it by Mr. Horn if you will just let me do it. I've got his commitment, August 24th, where he says, "We will lend you $10,400.00. Of course—a form, but says, "You've got to have clear title." Of course, he's not going to lend him any money 'till he gets clear title. I've got his repayment of construction money and we have the order

(Vol. X, p. 93)

showing that they didn't order it shipped until, uh, some time in September. He didn't have any house up there by U. S. Steel.

Mr. Hamilton: They had ordered it though.

Mr. Anderson: The point is that they had ordered it before the lawsuit was filed.

Mr. Reutlinger: They ordered it before the lawsuit was filed. The franchise agreement which is not yet in evidence, but is in the record, of course, generally—we'll get that in—does not specify that he has to order any particular amount, nor the loan agreement, so, having not shipped, and we have had already had Mr. Miles telling us that the custom was to make the order, but not ask for the delivery until they wanted it.

Well, if he never asked for delivery, under the franchise agreement he has no obligation. This transaction occurred exactly like this. I don't have the sales contract, if any. I think this was a speculative house—fact, I'm sure it was, now, upon reflection, on Lot 205.

Of course, we are not going to lend him any more money. He's already sued us—be ridiculous to tell you that was so. So, he said—all right—be—don't make any difference what he said—said, "I want out. I want

(Vol. X, p. 94)

this lot released. I want to move ahead." As I say, I think it's speculative. We'll come to that when, as and if we get to it. We said, "Fine; pay it off and we'll send you a release."

Next thing he does, he goes around to the Louisville Mortgage Service and Ed Horn writes him on August 24, 1962, "We are pleased to do a private construction loan at $10,400." Again, a form letter, obviously. So, presumably, he borrows the money some time shortly there after this, pays us the $2,200 which Mr. Rollins will testify about on a date which is either at or just before this date.

We authorized the title company to release it. All we ever got out of this lot was $2,250. Then, about that same time by an earlier order which had never been implemented, they say, on 9-4, which is admittedly a few days before this, but I think Mr. Horn will testify that that was routine, they said, "Send it on over," but before the house could obviously be built, like they say, in forty—it took us what, a hundred and twenty days to build, that release is put to record.

We then show what Horn has advanced through a period of days—but at various advances, so finally, he gets into hock on the construction money of $7,500 and the

(Vol. X, p. 95)

property is ultimately sold to Ash some time in 1962, that fall.

By the Court: But all that transpired after the suit was brought?

Mr. Reutlinger: Everything transpired after the suit was brought.

By the Court: Well, I'll let you put it in by avowal; not before the jury. You want to get Mr. Horn in and do it by question or answer, or do you want to dictate it?

Mr. Reutlinger: I think we can save time, unless the Court would prefer it. I'll leave it on that basis.

By the Court: No, I'll leave it to you all.

Mr. Reutlinger: I'll just put it in by way of avowal. If the witness Horn were permitted to answer, he would testify that the document which appears to be of record in Book 3776, Page 456, in the office of The Clerk of the Jefferson County Court, Louisville, Kentucky, is a partial release of the mortgage of Lot 205, Golden Meadows subdivision, Section 1-D, and that it bears imprint of recording in that Clerk's office of September 14, 1962;

That under date of August 24, 1962, over his sig-

(Vol. X, p. 96)

nature; the Witness Horn would testify that he wrote a form letter addressed to Fortner Enterprises, which made reference to a construction loan in the amount of $10,400, at six percent interest, one element of which—one requirement of which indicated that the property must be a fee simple estate and the entire property described in the said application, said estate to be free and clear of all defects or interest of others therein;

That subsequent to that date of August 24, 1962, and I don't know whether he can testify about the purchase order or not.

That subsequent to that date, funds were advanced on a construction loan in the amount of $7,583.51—take that back. Funds were advanced in the amount of $7,500 and that there was an additional charge of $11.51 for interest and the release of mortgage and that this was repaid on or about the 11th day of—uh, or the 23rd day of November, 1962, to the Louisville Mortgage Service Company.

Judge, I've got a similar transaction; same ruling?

By the Court: Yes.

Mr. Reutlinger: To the same effect, the witness Horn would testify if permitted, that a

(Vol. X, p. 97)

document which has been identified as a photostatic copy by the Clerk of the Jefferson County Court, is a photostatic copy of a partial release of mortgage of record in Deed Book 3677, Page 457, in the office of the Court of the Jefferson County Court, Kentucky, releasing Lot No. 271, as shown on the Plat of the Golden Meadows subdivision Section 2-A; that this document was put to record in the Clerk office as shown on the face thereof, on September 14, 1962; that on or about August 24, 1962, this witness, over his signature, wrote a form letter to Fortner Enterprises, Inc., regarding the Lot 271, indicating that a construction loan in the amount of $11,200 would be available provided there was clear title to the property which is a standard provision in all of the form letttera Mr. Horn sends; that subsequent to that time, funds were advanced for construction and that the Louisville Mortgage Service Company was repaid $11,-428.10 on or about March 4, 1963, which figure, I believe the witness would testify includes interest or perhaps a slight raise over the original commitment and I have these documents, Judge, that bear Horn's signature and the two releases which I would ask be filed in connection with the avowal, or tendered in connection with the avowal.

By the Court: All right; let them be tendered and marked in connection with the avowal.

(Vol. X, p. 98)

(Whereupon, at this point at about the hours of 11:54, proceedings were returned to open Court before the jury and the following occurred.)

Redirect Examination

By Mr. Anderson:

Q. Mr. Horn, Mr. Reutlinger asked you some questions about Defendant's Exhibit No. 7, and that's that

loan, sir. Following the procedure that Mr. Reutlinger followed earlier on the figures that he has on the preceding page, it a house were valued at $11,400, then if I understood the procedure, you went through, uh, eighty-five per cent of that would be taken and I figured it up here real quickly and eighty five per cent of that would amount to $9,690.00; does that sound about right?

A. Sounds about right.

Q. And the way Mr. Reutlinger approached it we would subtract that lot valuation appearing on that exhibit B, back there.

A. That's right.

Q. Of $1,720, I believe it was, and if that procedure is the correct procedure to follow, then that would mean that there would be, to round it off, about

(Vol. X, p. 99)

$8,000 available to build the house out of the construction loan; is that correct, sir?

A. That's correct.

Q. And this paragraph to which Mr. Reutlinger referred you does pertain to the allocation of the construction note, loan, that was on—

A. (Interrupting) That's the way I interpret it.

Q. All right, Mr. Horn. If Fortner Enterprises paid some discounts on some of these closing sheets on some of these transactions, uh, to which Mr. Reutlinger referred you earlier, and if a portion of those discounts were subsequently refunded to Fortner Enterprises, what would be the explanation for that?

A. Well now, in the first place, the F.H.A. requires that the discount must be paid by the seller; it cannot be paid by the purchaser. Therefore, the discount is charged to the seller. Now, many times in order to facilitate the closing of the loan, we would not know to whom we were going to sell this mortgage. In other words, we were mak-

ing these mortgages for our investors. In a great many cases, we knew who the investors were before we closed the loan and therefore, knew what the discount was.

In those cases where we did not know who the

(Vol. X, p. 100)

investor was we would charge a discount sufficient enough to cover the general market. I mean, if we were caught and had to pay more discount than normal, we would see that we had enough in advance. Then when we sold the loan, if we found out that we had charged too much discount then we would refund the difference to Mr. Fortner.

Mr. Anderson: All right; that's all.

Recross-examination

By Mr. Reutlinger:

Q. If you should underestimate the discount you had to charge him more?

A. We would, yes.

Q. Worked both ways, didn't it?

A. Worked both ways.

Mr. Reutlinger: I have nothing further.

Mr. Anderson: Than you, Mr. Horn. We would call Mr. Paul Semonin.

(Xol. X, p. 101)

CERTIFICATE

I, Charles L. Sterling, Official Court Reporter, United States District Court, Western District of Kentucky, at Louisville, Kentucky, hereby certify that the entire proceedings in the captioned cause were taken down by me in stenographic notes at the time and place stated in the caption; that the foregoing "Partial Transcript of Proceedings" is a true and accurate and complete transcript of my stenographic notes so taken and that said transcript was prepared under my supervision and direction.

I further certify that I am not related by blood or marraige to any of the parties hereto and that I have no interest in the outcome of the captioned case.

Given under my hand this the 24th day of June, 1970, at Louisville, Kentucky.

Official Reporter.

(Vol. X, p. 102)

* * * * * * *

By the Court: All right sir.

Mr. Anderson: We will call Mr. Paul Semonin.

MR. PAUL F. SEMONIN, JR., called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

(Vol. X, p. 103)

Direct Examination

By Mr. Anderson:

Q. Mr. Semonin, this is a big room so we will ask you to speak up, please sir; what is your name?

A. Paul F. Semonin, Jr.

Q. And what is your business?

A. Basically, I am in the real estate, general real estate business. Primarily I have been personally concerned since about 1952 with land development, subdivisions, working with builders and so forth, but primarily my business today is land development.

Q. What companies are you associated with that we would be familiar with, sir?

A. You mean with developments?

Q. Well, first, what companies you operate under and then we will talk about development.

A. Well, I operate under the basic company, Paul

Semonin Company with offices in the Starks Building and we have about eight or ten or so developments that I set up under separate corporations, most of them, but I—like in Hunting Creek, Shadow Wood, Hollow Creek, and there are ten or twelve of them.

Q. All right sir; is it customary to establish a separate corporation for each separate development

(Vol. X, p. 104)

in this area?

A. Well, with us it is customary, yes.

Q. All right; how many years have you been associated all together with the real estate business in this area?

A. About thirty-five years.

Q. All right. Have you received any awards as a result of your activities in the real estate field?

A. Well, I was President of the Real Estate Board in 1948.

Q. Uh-huh.

A. I was elected Realtor of the Year in 1960. Other than that I can't recall—can't really think of anything that would be significant.

Q. All right sir; would you tell us, Mr. Semonin if—well, over the past, well, since 1955 how many different subdivision developments have you been associated with approximately?

A. I'd say about fifteen or eighteen.

Q. All right; during the period 1959, 1960 and 1961, as a result of your relationship with various subdivision developments, were you and are you familiar with the types of financing available to developers and buildings during those years, that period of time?

(Vol. X, p. 105)

A. Yes, I think I am.

Q. All right sir; would you tell the jury whether or not during that period of time there was any what we have

called one hundred per cent land acquisition and development loans available from normal or conventional lending sources?

A. Uh, not usually, there was not, no.

Q. All right sir. Now, Mr. Semonin, based on your experience in developing real estate and selling houses do you have an opinion as to the normal and usual profit to be expected by a developer-builder, assuming that you would have a subdivision containing approximately two hundred nineteen lots in the Southwestern portion of Jefferson County in which the houses were selling in the price range of $11,400 to approximately $15,000 to $16,000 with schools within reasonable distance and assuming further that F.H.A. type financing was available for the ultimate purchaser.

Now, assuming those facts to be true, would you have an opinion as to the fair and reasonable profit which a builder-developer could expect to receive under such circumstances?

A. Would you want me to break it down, give an opinion as to what the builder should make, uh, sep-

(Vol. X, p. 106)

arately from what the developer, or do you want me to combine the two?

Q. Well, either way that it would be preferable to you, sir. In my assumption I am asking you to assume that the builder and developer are one and the same.

A. Well, I would like to qualify that I personally am not a builder. I every once in a while have a house built for me speculatively, but in the land development business I work almost constantly with speculative builders or really the life-blood of land development because that's the only successful way to sell lots is to have some builder build a house on them, but to be specific, the builders that I work

with, I don't, uh, it's hard for me to think of any who think of anything other than a ten per cent net profit.

Mr. Reutlinger: Note an objection, if Your Honor please. I think the witness has disqualified himself on building.

Mr. Anderson: Well, if the Court please, he has indicated that he has worked with many and is familiar.

The Witness: Yes.

By the Court: Well, I will

(Vol. X, p. 107)

let him give it and the jury can weigh it under the instructions as to experts.

Q. All right; I wasn't sure if you gave us a percentage or not.

A. Yes, I said ten per cent net is what I said.

Q. All right; and how would you figure that, sir?

A. Well, what the house and the construction cost of the house and the land that it was on, just add ten per cent net profit to it taking into consideration overhead and so forth.

Q. All right sir; may I ask if your testimony as to the builder's profit, uh, based on his acquiring a developed lot from someone else, or his developing the lot—

Mr. Reutlinger: (Interrupting) If Your Honor please, the question is leading and the witness has already said that it is lot and house together.

By the Court: Overruled.

Mr. Anderson: The question is not leading, I gave an alternative.

By the Court: Well, go ahead.

(Vol. X, p. 108)

Mr. Anderson: Thank you.

A. Will you ask it again?

Q. The question, Mr. Semonin, was, was the ten per cent figure which you gave us, is that based on the builder

purchasing the lot already developed or does it include development of the lot?

A. In my opinion, my answer would include either way. I simply stated that my connection with speculative builders, I cannot think of any who don't aspire and, in my opinion, were entitled to a ten per cent net profit on the cost of the house and the land.

By the Court: Well, work that out on a $11,400 house so that the jury understands what Mr. Semonin is testifying about.

Mr. Anderson: Yes sir.

Q. Assuming, Mr. Semonin, that a house sold for $11,400. To what would you apply your ten per cent figure?

A. The cost to him of the house itself and the land that it was on.

Q. All right sir; let's see. If the cost to which you have referred was $10,000, ten per cent of that would be $1,000?

A. Yes sir.

(Vol. X, p. 109)

Q. And the total then would be a sale price of $11,000; would that be correct, sir?

A. That—yes, that's what—

Q. Under this particular assumption?

A. Yes.

Q. All right; so, to arrive at a sale, working backwards here to arrive at a sale price of $11,400, under your testimony the cost would be somewhere in excess of $10,000 to get the mathematics worked out.

A. Yes, I'm saying net profit.

Q. Yes sir.

By the Court: Well, what is the twenty per cent figure he was talking about?

Mr. Anderson: He didn't refer to a twenty per cent figure.

By the Court: Oh, I misunderstood him; all right. This

is the figure of the builder and developer combined he's testifying about?

The Witness: No.

Mr. Anderson: He is saying no to that, Your Honor. I didn't think it was either, but that's why I asked a question.

The Witness: I meant to answer the question referring only to my opinion of

(Vol. X, p. 110)

the builder's profit, what he would be, in my opinion, entitled to.

Q. All right sir.

A. Now, I didn't get into the land part—I hadn't at that point.

Q. All right. Well, would you give us your opinion concerning the land?

A. And we are talking about the same—what time, 1960?

Q. 1960, 1961, 1962 actually.

A. Well, I don't like to philosophize particularly in this position, but the—uh, I have—originally when I went into the land development business, the profit of a developer was—I've seen it, and they figured if they could not double their money it was a bad deal for the developer.

As time has gone on and competition has gotten tougher as times went on, that has diminished and now, to answer your question specifically as it relates to this particular time, in my opinion, as to what would be a reasonable profit for the developer to expect, my answer would be thirty-five to forty per cent profit.

A. All right sir; so if, assuming that you would have lot cost including the development cost,

(Vol. X, p. 111)

well, let's say $1,600, and thirty-five per cent would be $560?

A. That's right.

Q. So that that lot would be expected to sell for $2,160 then approximately?

A. Yes, yes sir.

Q. All right; and getting back now to the builder for a moment, uh, if you had expense of building a house of, let's say for purposes of round figures, $8,000, would you add that figure to this $2,160 to arrive at the figure to use for the ten per cent?

A. Well, if the $8,000 has got its profit in it I would add the two together.

Q. No sir; I don't think you understand me. What I am saying is if it cost $8,000 in total to build the house that would be put on this lot, would you add these two figures together to reach your total cost figure

A. Yes, I think I would end up with a little more—end up with his profit on—he would be entitled to a profit on the house itself, in my opinion.

Q. Well, that's what I'm getting at, is what figure you would use under this circumstance; what figure you would use your ten per cent profit for the

(Vol. X, p. 112)

builder on, whether you would use it on the combination of these two or just the $8,000 or what?

A. I would use it on the cost of the residence.

Q. All right; so, you would use it on the $8,000?

A. (Witness nodded head affirmatively.)

Q. Well, in this particular instance then, the ten per cent would equal $800?

A. That's right.

Q. All right sir; and he would have $560 of profit in the lot?

A. Yes.

Q. And that would be then a total profit of $1,360 under this approach; is that right, sir?

A. Yes.

Q. All right, Mr. Semonin; assuming that you had a subdivision in the Southwestern portion of Jefferson County in this price range of $11,400 to $15,000 to $16,000 in the period of 1961 and 1962, and assuming specifically that there were two hundred nineteen to be sold, do you have an opinion as to whether or not the two hundred nineteen could be reasonably expected to be built and sold in a two year period of time?

(Vol. X, p. 113)

A. I would think that would be pushing it; I doubt that it could be done that quickly.

Q. How quickly, in your opinion, would it be done?

A. Maybe three years.

Mr. Anderson: That's all.

Cross-examination

By Mr. Reutlinger:

Q. Just so I understand the computation, Mr. Semonin, I'll flip it over a little bit here. My notes show, in any event, that the land should go between thirty-five and forty per cent of the costs?

A. Yeah.

Q. And you're going to have to bear with me in the arithmetic, Mr. Semonin, in this case, because I am poor at that.

So, if the lot costs $1,720 and you used a forty per cent, the lot profit should be $688, or the total if my arithmetic is right, would be, cost and profit, $2,400 for the land, rounding it off?

A. Yes sir.

Q. Now, let's assume the house costs, like the plumber and the carpenter, and all like that goes for $8,000, and I believe you mentioned in your direct

(Vol. X, p. 114)

testimony some overhead costs too, didn't you?

A. Yes.

Q. For example, sales commission, discount on the sale; at that time you had that, and the interest if you borrowed money, so let's assume that those figures are $300 commission. This is basic cost, $300, money discount and $300 interest; that's $8,900 and on all these costs you would expect to get a ten per cent profit or $890 and this is just the building?

A. Well, you are doing it a little bit differently.

Q. How would you handle that?

A. Well, in the first place, I—what I was trying to say was that the land did not cost $2,400. It was my opinion that if the land costs the developer—actual cost, using your figure, or $1,720.

Q. Yes.

A. That he was entitled to a thiry to forty per cent write-up on that.

Q. Well, if I have done that correctly that ends up with—well, just put land value?

A. That suits me better.

Q. I'm sorry; because there was the cost—that's right; I'm sorry. Okay; now then, if the basic

(Vol. X, p. 115)

cost such as the carpenter, is $8,000 and the commission is $300 and the money discount $300 and the interest if $300, the builder is then entitled to a ten per cent profit on these costs?

A. Well, we—you and I are a little bit different here.

Q. All right; I mean, that's—how would you—

A. (Interrupting) I hadn't gotten as far as including real estate commission in my thinking. I was thinking about an ordinary builder who may or may not have a real estate agent and my testimony meant that what I thought the average builder would have—

Q. (Interrupting) Well, let's assume he had a real estate agent.

A. All right.

Q. And was charged a $300 commission?

A. All right.

Q. Make that assumption?

A. All right.

Q. And make that assumption that the discount at which the seller has to pay, I believe, under F.H.A., would be $300; make the assumption, and make the further assumption that the interest allocated to this one lot—

(Vol. X, p. 116)

we're talking about one house and lot, is $300. Now, with that assumption—I'm sure my arithmetic is correct at $8,900, am I not?

A. With that assumption, you are correct, yes.

Q. All right; now, what profit do you believe the builder would be entitled to on this section right here, the $8,000, and $300, $300, and $300?

A. Yes. Well, assuming the house, uh, carpenter work and plumbing and that sort of work cost $8,000.

Q. Yes sir.

A. And if, and further assuming the following three hundred dollars were included in his overhead.

Q. Oh, I—yes, that's overhead.

A. Nothing to do except add ten per cent to it.

Q. All right; that's what I'm driving at and that is what you would do.

A. Yes.

Q. I'm not saying that's true; I mean that is the assumption?

A. Yes.

Q. So, that is $890 which—have I added

(Vol. X, p. 117)

right, $9,790, so you have got twenty-four and nine hundred

seventy and we would come up with something like one, nine, eleven—

A. (Interrupting) Twelve.

Q. I have done something wrong here, haven't I? My arithmetic is—my arithmetic is right, isn't it?

A. No.

Q. What have I done. Well, this is going to have to be off somewhere; this would be the cost to the seller—to the purchaser of the package to give the profit that you have discussed earlier, the $12,190?

A. Yes.

Q. Now, your testimony, I assume, is not based on any particular transaction, but what the trade hopes to obtain?

A. What they hope to obtain and what I know that they have obtained.

Q. Have obtained in other instances?

A. A great many.

Q. I believe everyone hopes to get three thousand per cent, but I mean—

A. (Interrupting) That's right.

Q. This is—well, it's what the—what

(Vol. X, p. 118)

the trade generally expects to obtain based on experience?

A. (Witness nodded head affirmatively.)

Q. So, I have constructed it a different way to you.

A. That—which has been generally accepted to be—

Q. (Interrupting) Within the trade.

A. Yeah, right.

Q. Now, what a man would actually expect in a given situation, I'm sure, would depend on how he priced his houses?

A. Yes.

Q. Obviously, so, if he priced them, for example, at less than $12,190 he wouldn't expect to make as much profit, would he?

A. No.

Q. Of course that has to be so.

A. Yes.

Q. And if, for example, he had either miscalculated on any of the items here, such as overhead in the basic costs, and they were more, even if he had charged the full figure we have computed here, his profit would be less by the result of that miscalculation

(Vol. X, p. 119)

which gave him more overhead to absorb?

A. That's right; on any sales that he had made that is certainly true.

Q. That's right; I assume also from your direct testimony you have been discussing speculative building?

A. Yes.

Q. Not contract building?

A. Well, my experience has been more with speculative builders than it has been with contract. The fact of the matter is, the contract building business is pretty—uh, there isn't much to it anymore, but I will have to say in defense of my testimony that what I said is generally true also of a contract builder.

Q. Have you ever had any experience with contract builders, as such?

A. Yes, I—the only way I even get close to being in the building business is in the land development; every so often I would have a builder build a house or two for me and I'll be the speculator.

Q. I'm speaking now of contract builders.

A. Contract; I mean, it will be a contract with me and I, of course—

Q. (Interrupting) I know, but you are not

(Vol. X, p. 120)

going to go live in that house.

A. No.

Q. It is a speculative house for you, isn't it?

A. But, and in our business, I know many of our people make deals for builders, for someone who is going to, so it isn't based entirely—that's the only point I'm trying to make now, it isn't based entirely on speculative building; primarily, that's true.

Q. Primarily; the bulk of your experience, and I think you told us it was limited as far as building goes anyhow?

A. Yes.

Q. And that you are basically, as you and I both know, are a land developer?

A. Yes.

Q. And mostly in the East end?

A. Yes.

Q. Not in the Southwestern part of the County?

A. Well, a little bit, but not much.

Q. Not much. All right; you concentrate on the silk stocking end, don't you?

A. On what?

Q. The silk stocking end of town?

(Vol. X, p. 121)

A. Well, you have said that.

Q. All right. Well, you are in the Indian Hills area, Hunting Creek, which is out near Prospect?

A. Well, we have got—we have got a few that are not so fancy, the Fegenbush Lane and Hollow Creek and Spring Mill.

Q. Are those in the Southwest part of the County?

A. Well, they are in the South part; they are a little more East.

Q. They are not out the Dixie Highway?

A. No.

Q. All right. I believe you did tell us that two hun-

dred nineteen lots, to your way of thinking, would take three years to move?

A. That would be—if I had to guess that would be—

Q. That's right; that in your opinion it would be three years?

A. That—yes.

Q. And I also assume that you made no direct inquiry about availability of the financing; you're speaking just from general knowledge when you made your statements?

(Vol. X, p. 122)

A. That's right.

Q. What did you say; I didn't hear you.

A. You asked if I made any special study of availability of financing.

Q. Yes.

A. You mean as it relates to this case?

Q. Yes.

A. No, I haven't.

Mr. Reutlinger: That's all I have of this witness.

Mr. Anderson: We have no further questions.

By the Court: You may stand aside.

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(Vol. XI, p. 1)

TRANSCRIPT OF PROCEEDINGS

VOLUME XI

Before Honorable James F. Gordon, United States District Judge for the Western District of Kentucky, at Louisville, Kentucky, on Wednesday, June 17, 1970.

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(Vol. XI, p. 3)

By the Court: Good afternoon, ladies and gentlemen; are we ready to proceed, gentlemen?

Mr. Reutlinger: Yes sir. If Your Honor please, by agreement, the record may show that the order of proof has been waived and we will call Mr. Gilchrest.

MR. DON GILCHREST, called as a witness by the Defendants, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Reutlinger:

Q. State your name.

A. Don Gilchrest.

Q. Where do you live, Mr. Gilchrest?

A. Washington, D.C.

Q. And what is your occupation?

(Vol. XI, p. 4)

A. I am Executive Vice-President of the National Association of Building Manufacturers.

Q. Did that used to be the Home Manufacturers' Association?

A. Yes, it did.

Q. And how long have you been with that organization?

A. Two years.

Q. Are you what would be referred to as the highest paid helper?

A. Yes.

Q. All right; this is your paid job?

A. Yes.

Q. And is the President a non-paying or an honorary title?

A. That's correct.

Q. What is the purpose or function of the National Association of Building Manufacturers?

A. We perform the functions that are commonly performed by a trade association representing the collective business interests of the people in the industry, uh, including the compiling of statistics on industry performance and this type thing.

Q. In compiling those statistics do you also

(Vol. XI, p. 5)

compile comparative statistics—difficult words—on other than prefabricated dwellings?

A. We don't compile the other statistics. We refer to reports from the Bureau of Census who survey the entire housing industry.

Q. Are those sent to you in ordinary course of business, the census reports?

A. Yes, we receive them.

Q. At my request, for the years 1960, 1961 and 1962, did you from your records obtain certain figures, first on all of the non-farm housing starts in the State of Kentucky?

A. Yes.

Q. Would you read those into the record here, identifying each by the appropriate year?

A. In 1960 there were 16,500 non-farm housing starts in Kentucky. In 1961 there were 15,000 and in 1962 there were 18,400.

Q. And did you also at my request procure the figures on prefabricated homes in the State of Kentucky for the years 1960, 1961 and 1962?

A. I did.

Q. Would you read those into the record giving the appropriate year?

(Vol. XI, p. 6)

A. In 1960 there were 1,160 prefabricated units; in 1961 there were 1,555 and in 1962 there were 3,535.

Q. Do your records reflect the number of companies or businesses that participated in furnishing the prafabricated houses to the Kentucky market?

A. Yes sir.

Q. Over those years?

A. Yes, they do.

Q. Would you read those figures into the record, please?

A. In 1960 there were eighteen companies selling prefabricated houses in Kentucky. In 1961 there were twenty-eight and in 1962 there were forty-six.

Q. Do your records reflect a breakdown on the allocation as to any particular number of housing units furnished by those companies?

A. By an individual company?

Q. Yes.

A. No sir.

Q. Mr. Gilchrest, also at my request for the years, 1960, 1961 and 1962 did you determine from your records the total housing starts in the United

(Vol. XI, p. 7)

States?

A. I have that; yes sir.

Q. Would you read that into the record giving reference to the appropriate years?

By the Court: This is all types of prefabs?

Mr. Reutlinger: I can furnish this to the Court. Yes sir.

The Witness: This is total housing starts.

Q. This is all types. I thought you said—all types, yes.

Mr. Anderson: If the Court please, I think we are going a bit far afield with this information and we would object to it.

Q. All right; did you at my request ascertain the total number of single-type family dwellings started in the United States for the years 1960, 1961 and 1962?

A. Yes.

Mr. Anderson: Same objection, Your Honor.

By the Court: Overruled.

Q. Would you read that into the record?

A. In 1960 there were 1,000,900 single

(Vol. XI, p. 8)

family; in 1961 there were 989,000 and in 1962 there were 996,000 single family houses built.

Q. Did you also at my request and from your records ascertain for the years 1960, 1961 and 1962 the number of single-family manufactured housing units supplied to the United States as a whole?

A. I did.

Q. Would you read those into the record, please?

Mr. Anderson: May we have a continuing objection?

By the Court: Yes sir.

Mr. Anderson: Your Honor, I apologize for keeping on interrupting, but on any testimony pertaining to the nation as a whole it is our position this is not relevant or material.

By the Court: Let it be overruled and you may have a continuing objection.

Mr. Anderson: Thank you.

Q. You may read the figures into the record, Mr. Gilchrest.

A. In 1960 there were 126,867 prefabricated housing units built; in 1961 it was 156,004, and in 1962 it was 186,152.

(Vol. XI, p. 9)

Q. Do these figures you have just given include units furnished by the Homes Division of the United States Steel Corporation?

A. Yes, they do.

Q. I will now ask you to furnish into the record from the records you have from your organization, excluding homes furnished by the United States Steel Corporation Homes Division, the numbers or where appropriate, the approximate numbers of prefabricated units furnished by the four leading producers for the years 1960, 1961 and 1962.

A. The leading producer is National Homes Corporation, and in 1960 they produced 16,804 units. In 1961, 18,276 and in 1962, 17,289.

The second largest producer was Swift Industries from Pittsburgh, and they produced 2,500, 3,000 and 2,500 in those three years and those are rounded off figures in that case.

The third largest was Inland Homes from Piqua, Ohio, and they produced 2,281, 2,253 in 1961 and 1,943 in 1962.

The number four company was Kingsbury Homes with headquarters in Atlanta, and they produced 1,401, 2,150 and 2,807 in 1962.

(Vol. XI, p. 10)

Mr. Reutlinger: That's all of the questions I have of this witness, if Your Honor please.

Cross-examination

By Mr. Hamilton:

Q. Mr. Gilchrest, I believe that you indicated that there were—well, let me ask you how many prefabricated

homes did you say were sold within the State of Kentucky during the year 1960?

A. 16,500—pardon me. I beg your pardon; that is the total housing starts in Kentucky. The prefabricated was 1,160.

Q. Now, Mr. Gilchrest, do you have that number broken down by County or region?

A. No, sir; I do not.

Q. You have only as—

A. (Interrupting) Only for the State as a whole; yes sir.

Q. I see. Do you have any records with you that would make it possible for you to break that number down to sub-territories?

A. No sir.

Q. I see; and is the answer the same for 1961 and 1962?

(Vol. XI, p. 11)

A. Yes sir.

Q. All right; now, I wonder if you would tell the Court and jury your definition or your association's definition of a manufactured home?

A. A manufactured home, as we define it, comes in basically two forms, one which is what we will refer to as a package of prefabricated, pre-assembled component parts, wall panels, floor sections, roof trusses, put together on site in that form as the typical, traditional prefab—prefabricated home and was the only form of it that really existed at that time under consideration.

We also include the newer modular, three dimensional type which is totally produced in the factory.

Q. I see. Now, can you tell us what the average cost per manufactured house package was in the year 1960?

A. I believe I can; $3,262.

Q. Now, would you give us that same information for 1961, please sir?

A. We show the same figure for 1961.

Q. And what about 1962?

A. It had increased to $4,044.

Q. All right sir; would your records indicate

(Vol. XI, p. 12)

how many States in the United States in which the United States Steel Homes Division sells houses?

A. No sir.

Q. It would not?

A. No sir.

Q. Would your records indicate how many States that National Homes does business in selling those houses?

A. No sir; we do not have those records.

Q. I see. Now, during the year 1960 could you tell us how many homes the United States Steel Homes Division sold or shipped?

A. I don't have those figures.

Q. Would your answer be the same for 1961?

A. Yes sir.

Q. And 1962?

A. Yes sir.

Q. Well now, Mr. Gilchrest, I believe that you have testified a moment ago when you gave us the sales figures of the four largest companies that you had omitted from those figures any sales by the United States Steel Homes Division; is that correct?

A. Yes sir; this is correct.

Q. Well, how did you eliminate them if you

(Vol. XI, p. 13)

didn't know how many they sold?

A. The way I obtained these figures, these figures are derived from a survey, which are run through outside con-

sultations firms, such as Price-Waterhouse and so forth and going back, seven, eight, nine and ten years they do not retain the survey information; they have just the total results.

So, they did not have the—I had to call the individual companies involved and I got this information from the executives from these four companies which I cited. I did not and was not asked to and did not get this information for U. S. Steel.

Q. I see.

Mr. Reutlinger: We have that in the record and can supply it, if Your Honor please; no secret.

By the Court: Is it in the record?

Mr. Reutlinger: Mr. Anderson has seen to it that it's already in the record. I don't know if it's before the jury or not, but certainly there is no secret about it.

Q. Mr. Gilchrest, your association is supported, it is not, by the manufacturers of these homes,

(Vol. XI, p. 14)

the United States Steel Corporation being one of those manufacturers; is that correct?

A. No sir; the United States Steel Homes is not a member of the association.

Q. They are not a member of the association?

A. No sir.

Q. I see; how many of the home producers are members of the association, Mr. Gilchrest?

A. We have one hundred fifty companies who are home producers in the association.

Q. I see; and how many would you have had in 1960?

A. I will have to estimate that at probably seventy-five.

Q. I see; and what about 1961?

A. I would say it would be fairly constant in those periods.

Q. Mr. Gilchrest, the figures that you have testified about, I believe when you started testifying you said they were estimated; is that correct?

A. I have mentioned a lot of figures here.

Q. All right; let's go specifically—you said, I believe, that there were, and we will take 1960, that there were 1,160 manufactured homes sold

(Vol. XI, p. 15)

in the State of Kentucky; is that correct?

A. Yes, and that is an estimate.

Q. That is an estimated figure?

A. Yes, it is.

Q. Now, would the figure that you just testified to for the year 1961 likewise be an estimated figure?

A. Yes, it would.

Q. And the same would be true for 1962?

A. That is correct.

Mr. Hamilton: Thank you.

Redirect Examination

By Mr. Reutlinger:

Q. I am going to ask of the witness how the estimate was obtained, if you can tell us, how you arrived at the estimated figure?

Mr. Anderson: If the Court please, he has testified he has only been with the Company two years.

Mr. Reutlinger: He still may know how the estimated figure was obtained; if he doesn't let him say.

By the Court: I will let him answer that if he can.

(Vol. XI, p. 16)

Mr. Reutlinger: He may not know.

A. Well, I would have to hazard a guess. If I were doing it today, the way I would do it, we would determine the number of units—

Mr. Anderson: (Interrupting) He has disqualified himself; object to the answer.

By the Court: Yes. I don't believe he is qualified to tell how they did it in 1961 and 1962.

Q. These records that you have testified from regarding the earlier figures for Kentucky are on the stationery, I believe, of the former name of your organization, aren't they?

A. That is correct.

Q. And I believe I gave those to you this morning, didn't I?

A. That is correct.

Mr. Reutlinger: That's all.

By the Court: You may stand aside.

Mr. Reutlinger: May they be filed, Your Honor, because I obtained them from Mr. Anderson.

(Vol. XI, p. 17)

By the Court: All right; let them be filed.

Mr. Reutlinger: So, those will be exhibits of the Defendants, the next three in order.

(Whereupon a document entitled "Home Manufacturers' Association, Industry-Wide Survey, 1960," was marked for identification as Defendant's Exhibit No. 127 and received in evidence; a document entitled "Home Manufacturers' Association, Industry-Wide Survey, 1961," was marked for identifiaction as Defendant's Exhibit No. 128, and received in evidence; a document entitled "Home Manufacturers' Association, Industry-Wide Survey, 1962," was marked for identification as Defendant's Exhibit No. 129, and received in evidence.)

By the Court: All right.

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TRANSCRIPT OF PROCEEDINGS

VOLUME XII

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Thursday, June 1.

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Testimony of MR. JOHN COOPER, called by plaintiff on cross-examination by Mr. Reutlinger.

(Vol. XII, p. 69)

Q. All right.

A. And at this point I called—I have a gross and this is a true gross profit figure.

Q. Okay.

A. $149,285.88.

Q. All right.

A. And now, from that figure we have to subtract overhead expenses.

By the Court: Well now, is it—you want him to enumerate each of those?

Mr. Reutlinger: I have no—counsel can write it on the board quickly; I mean, without asking the witness.

By the Court: I was just trying to save some time in writing the figures because I think that rather than to elucidate the jury, it just confuses them further. The overhead is $20,560.00, would be the testimony, isn't it?

Mr. Reutlinger: That would be the testimony, yes, sir; we can pick some out on cross when we have to.

Mr. Anderson: All right. We will just put total figure on then, Your Honor, of $20,560.00.

(Vol. XII, p. 70)

Q. And you said you had to subtract these?

A. Right.

Q. And is that the projected net profit figure?

A. Yes.

Q. Now, again using the two hundred fourteen, what does that come out to as an average net profit?

A. An average net profit would be $601.52.

Q. Mr. Cooper, in your opinion as a Certified Public Accountant in charge of the books and records of the Fortner Enterprises, Incorporated, is this projection of the net profit which we have gone through a fair and accurate projection of the profits?

A. Uh, in my opinion it is, yes.

Q. All right, sir. Other than, uh, one $150.00 increase in prices which we already have heard about in evidence in this case, does this projection take into consideration any increases in prices?

A. Not to my knowledge.

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(Vol. XII, p. 108)

Q. Was there any significance to or what was the reason for picking only forty-five homes to make a projection on when at that time sixty-seven had been sold?

A. I was requested to make this projection based on those forty-five homes.

Q. By whom?

A. By, uh, Mr. Anderson.

Q. All right. Now, let's move on to the projection which we worked with this morning which covers, I believe, fifty-nine homes excluding four models and your averages were given on fifty-four homes?

A. Yes, sir.

Q. And of course at that time obviously, as in the other question, all sixty-seven had been sold, hadn't they?

A. Yes.

Q. What was the reason for or the significance of only picking out fifty-four to work with?

A. Well, the reason this June 5th was the date chosen?

(Vol. XII, p. 109)

Q. Yes, sir.

A. Uh, and I understand that that was the date, uh, at which the Credit Corporation said that they could build nothing but U. S. Steel homes in this subdivision.

Q. Wasn't that in the loan agreement all along, or do you know?

A. I don't know.

Q. You don't know?

A. Most probably it was.

Q. That's right; in any event, Mr. Anderson told you to cut it off at that date?

A. At June 5, 1962.

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(Vol. XII p. 131)

Q. All right. Well then, when Mr. Fortner tells this Court that he lost profits on homes already built and was caused to lose profits on homes contemplated by the parties to be built which plaintiff has been unable to build, both in the amount of $900.00 for each of two hundred nineteen houses or $197,366.50, he just forgot to crank in the overhead because it is more like five hundred—somewhere between five hundred and eighty and six hundred, isn't it?

A. I can't say what Mr. Fortner thought.

Q. I know that. I know you can't say, but when he said this he was mistaken, wasn't he?

A. He was mistaken in his figures, yes.

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(Vol. XII, p. 137)

Mr. Anderson: Your Honor, we would like to read certain portions of the deposition of Mr. William H. Lang.

By the Court: All right.

(Whereupon, at this point portions of the Deposition of the witness William H. Lang were read by Counsel for Plaintiff, after which the following proceedings occurred.)

Mr. Anderson: If the Court please, I would now like to read an affidavit filed by Mr. Reutlinger in this lawsuit which was prepared on or about May 12, 1965, and that affidavit reads as follows:

"Affiant, after being duly sworn, states that his name is Albert F. Reutlinger; that he is attorney for the U. S. Steel Homes Credit Corporation; that he makes this affidavit to support a request for an execution pursuant to a judgment heretofore entered.

"Affiant states that the principal

(Vol. XII, p. 137(a))

(The following portions of the Deposition of Mr. William H. Lang were read at line six of the preceding page:

Page 4, Line 2 through Page 5, Line 18;
Page 9, Line 18 through Page 11, Line 5;
Page 21, Lines 2 through 6;
Page 23, Line 22 through Page 26, Line 6;
Page 30, Line 13 through Page 31, Line 11;
Page 43, Line 5 through Page 45, Line 17.)

(Lang Depo., p. 4)

Q. Mr. Lang, would you give us your full name, please?

A. William H. Lang

Q. And what is your home address, sir?

A. Number 10 Delbarton Drive, Short Hills, New Jersey.

Q. You are employed by the U. S. Steel Homes Credit Corporation, I believe?

A. I am employed by United States Steel Corporation.

Q. Are you also employed by a corporation entitled U. S. Steel Homes Credit Corporation?

A. I serve as president of the U. S. Steel Homes Credit Corporation.

Q. So that you hold positions with two separate corporations; is that correct?

A. That's correct.

Q. What is your position with United States Steel Corporation?

A. Vice-president and treasurer.

Q. And I believe that you stated you were president and treasurer of the U. S. Steel Homes Credit Corporation?

A. President. I used to be treasurer of it.

Q. You are not treasurer at the present time?

(L[illegible] Depo., p. 5)

A. We changed that around. At the time of this event, I was president and treasurer.

Q. In other words, as of June, July and August of 1962, you were president and treasurer ?

A. Yes, sir.

Q. Where are your offices located?

A. We have a headquarters office here, we have a branch office at New Albany.

Q. Your headquarters offices, then, are located at 71 Broadway, New York, New York?

A. That's right.

Q. And the branch office to which you referred is the office in New Albany, Indiana?

A. That's right.

Q. Where are you, yourself, presently located, Mr. Lang?

A. 71 Broadway.

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Deposition of Mr. William H. Lang

(Lang Depo., p. 9)

Q. As of January, 1954, in the course of your duties with the United States Steel Corporation, did you have any connection with the division of United States Steel Corporation which handled the manufacture and sale of prefabricated homes?

A. The Credit Corportion was designed, and has functioned, at the instigation of, or the invitation of, the Homes Division.

(Lang Depo., p. 10)

So that when a dealer was not able to finance through so-called local or normal channels, the Homes Division called in the Credit Corporation to see if we could assist their dealer, at their dealer's request, in meeting any of his financing problems.

Q. Prior to the formation of the Credit Corporation, did you have any connection, or were you involved, during the course of your duties, in the division of United States Steel Corporation that manufactured and sold the prefabricated homes?

A. None.

Q. None?

A. No.

Q. I assume, then, that you were just more or less aware of the existence of the Homes Division, but then had no particular contact or concern with it prior to the formation of the Credit Corporation?

A. That's right.

Q. I believe the Credit Corporation was established in 1954 as a completely separate corporate entity?

A. Right.

Q. I believe it is a Delaware corporation; is that correct?

Deposition of Mr. William H. Lang

(Lang Depo., p. 11)

Mr. Reutlinger: Whatever those interrogatories show; that is my impression.

The Witness: You have the books over there. It is a Delaware corporation.

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(Lang Depo., p. 21)

Q. The Credit Corporation, if I understand your previous testimony correctly, has been used since its formation as a tool to enable the Homes Division to sell prefabricated homes to its customers; would that be correct?

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(Lang Depo., p. 23)

A. My response to your question is simply this: It has to do with the word "tool."

The Credit Corporation, faithful to its original promises, has consistently, at the request of the Homes

(Lang Depo., p. 24)

Division, aided its sales program through aid given to dealers.

So therefore, when you say has the Credit Corporation been used to help the sales of the Homes Division, the answer is yes, it has been used to help the sales of the Homes Division.

Is that a response?

Q. Again, asking the question in terms of generalities: Are there, and have there been, instances in which the Credit Corporation has made loans at the insistence of the Homes Division in which the Credit Corporation has not considered the loans to be a good financial risk when regular banking and financing principles are applied to them?

The Witness: May I have the question read back, please?

(The reporter read back the pending question).

A. Yes.

Q. Have all the loans made by the Credit Corporation been in that category? Or have some of them not been, and have some of them been in that category?

A. Most of the loans have been made on the basis of sound and reasonable financial practices.

(Lang Depo., p. 25)

Q. But some have not?

A. Well, I say most of the loans have been made on the basis of sound and reasonable financing practice.

Q. And conversely, some have not been?

A. And there have been some where for one reason or another the Homes Division encouraged, or wanted, a piece of business. And those loans occasionally, infrequently, have been approved, or processed—not approved, processed.

Q. An underwriting agreement was entered into between the Homes Division and the Credit Corporation in March of 1962. Are you familiar with that agreement?

A. I am familiar with the idea and concept of it, yes.

Q. Were the loans identified in the attachment to that agreement, those loans which were considered by the Credit Corporation to have at one time or another been a doubtful financial risk?

A. I'd have to refresh my memory before I could answer that question. It's too long ago.

Mr. Reutlinger: There is a list appended to that, Mr. Lang (handing document).

A. (Cont.) May I have the question again, please?

(The reporter read back the question).

Lang Depo., p. 26)

A. (Cont.) At one time or another, the loans which are recorded here, or the companies which are recorded

here, were considered to be of doubtful or marginal risk. The condition of any one company changes from time to time.

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(Lang Depo., p. 30)

Q. Mr. Lang, in connection with the operation of the Homes Division of United States Steel Corporation, have you participated in the period since the formation of the Credit Corporation in decisions involving the type of product to be manufactured and sold by the Homes Division?

A. No.

Q. Have you participated in any decisions involving the market area in which the Homes Division would sell prefabricated homes and their component parts?

A. As part of the United States Steel Corporation, as well as having responsibility for aiding through the Credit Corporation, there have been occasions when, to

(Lang Depo., p. 31)

better plan our work, we have inquired or discussed, "Where is the market of the Homes Division?"

That is solely to obtain information so that we could be prepared to better serve them.

Q. Have you participated in any decisions as an officer of Credit Corporation concerning the prices to be charged for prefabricated homes and/or their component parts since the inception of Credit Corporation down to the present date?

A. Never.

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(Lang Depo., p. 43)

Q. My question is this, sir: Who made the decision to insert in said loan agreement the condition which I have previously described?

A. That condition being?

Q. That each home to be erected in the subdivision described in the loan agreement must be purchased from the Homes Division of United States Steel Corporation.

A. The decision to get into a financing operation to aid the Homes Division contemplated that loans would be made where it served to supplement—augment—the sales of the Homes Division. So that, as long as a loan was outstanding, we expected that the U. S. Steel Homes products would be used.

Otherwise, there was not reason for the loan, because we're not in a financing business, per se.

Q. My question, sir, was what person, or group of persons, made the decision to place that particular condition in the loan agreement as tendered to Fortner Enterprises, Inc.?

A. I am saying that that decision is inherent in

(Lang Depo., p. 44)

the very nature of the Credit Corporation. And that whoever made that decision merely implemented the general policy of the purpose for being, the reason for being in existence.

Q. Then that decision was a joint decision made by the Homes Division executives and the responsible executives of the Credit Corporation?

A. No.

Q. Was it a decision made by yourself, or Mr. Dyas, or both of you, as the chief executives of the Credit Corporation?

A. Yes.

Q. Without consultation with the Homes Division?

A. Well, the Homes Division knows, from the very nature of what we went over before, that the Credit Corporation is not in the general lending business, and that

every loan it makes is designed to aid in the distribution of their product.

So that they expect that every loan that we make is going to involve a sale of their product.

Q. And this is, then, a general understanding between Homes Division and the Credit Corporation which has existed from the formation of the Credit Corporation?

(Lang Depo., p. 45)

A. This is a general dictate by the people who organized the Credit Corporation; that is its reason for being.

Q. I believe the loans which were made to Fortner Enterprises, Inc. by the Credit Corporation were made to enable the Homes Division to obtain an entry into the Louisville and Jefferson County, Kentucky market; would that be correct?

A. The Homes Division had indicated that Fortner appeared to them as an interesting way in which they could have broader distribution in that local market.

Q. And negotiations were instituted and consummated by the Credit Corporation to aid the Homes Division in expanding its entry into that market; is that not correct?

A. Yes.

* * * * * * *

(Vol. XII, p. 144)

Mr. Anderson: One other thing, now, if the Court please; we would like to offer into evidence Plaintiff's Exhibit No. 31 which is an annual report of the United States Steel Corporation for the year 1961.

Mr. Reutlinger: Your Honor please, you notice or recall that I noted an objection to that earlier, I think sometime around June 1st. I don't believ that has any bearing on the litigation.

(Vol. XII, p. 145)

Mr. Anderson: The United States Steel Corporation, first, is one of the defendants in this case.

Mr. Reutlinger: I know it is a party to the litigation.

By the Court: Do you want to come up here and give me a reason?

(Whereupon, Counsel Approach the Bench at This Point.)

Mr. Reutlinger: The only purpose of this would be to show the enormous profits, certainly in dollars or percentage which the Steel Corporation as a whole generates. It is my understanding that the division involved here, which I am further advised has other operations not even connected with home packages, not segregated in there at all, which has no bearing on the litigation.

By the Court: I think it just happens to reflect a small portion here of homes.

Mr. Anderson: If the Court please, one of the defendants in this case is the United States Steel Corporation, not the Homes Division of United States Steel Corporation because it is a

(Vol. XII, p. 146)

part of United States Steel Corporation. The Supreme Court in its opinion, specifically in this paragraph here refers to large companies with vast wealth.

Mr. Reutlinger: Refers to—that doesn't break it down. This company didn't lend any money. We sold houses.

Mr. Anderson: The evidence shows, if the Court please, that United States Steel Corporation had, in the financial statement of the Credit Corporation, has committed itself to buy some nine millions of dollars of additional stock from the Credit Corporation and some twenty-nine millions of commitments of additional funds and I think that if nothing else we are entitled to introduce this record to show that they had the opportunity to—

By the Court: (Interrupting) I will overrule the objection, and I am doing it on the basis that this language in

here where the Court says it is easy to see how a big company with vast amounts of money could—

Mr. Reutlinger: (Interrupting) This doesn't show that, Judge; this simply shows that it is a big company.

By the Court: Well, it shows

(Vol. XII, p. 147)

it is big with vast amounts of money and it furnished money that the Credit Corporation had.

Mr. Reutlinger: All right.

(Whereupon, Counsel Returned to Counsel Table After Which, Mr. Anderson Resumed the Stand and the Following Proceedings Occurred.)

Mr. Anderson: From Plaintiff's Exhibit No. 31, from the consolidated statement of income, the annual report for the United States Steel Corporation for the year 1961 shows total income of $190,200,000.00 for the year 1960.

It shows total income of $304,200,000.00, and I believe that is all I wanted to read from it at this time, Your Honor.

By the Court: All right.

Mr. Anderson: If the Court please, just to be sure that you have taken judicial notice of Paragraph 545.6-14 of the Code of Federal Regulations—

By the Court: (Interrupting) So ordered.

Mr. Anderson: And also of the

(Vol. XII, p. 148)

Federal Reserve Act pertaining to banks.

By the Court: So ordered.

Mr. Anderson: That is the case for the plaintiff, Your Honor.

By the Court: Well, will you be ready in the morning with your first witness?

Mr. Reutlinger: Yes, sir.

By the Court: All right; ladies and gentlemen; the plaintiff has now closed its case, so beginning in the morning we

will hear the proof of the defendant Steel Corporation and therefore remember the admonitions of the Court and do not form or express any opinion about this matter until you hear all of the evidence in the case and do not discuss it among yourselves nor with any other person and do not allow it to be discussed in your presence, sight or hearing and be back in the morning at nine-thirty.

Now, I assume there are some motions you want to dispose of, so we will go into chambers and take care of that.

(Whereupon, at About the Hour of 3:23 P.M. an Adjournment Was Taken to the Court's Chambers and the Following Proceedings Occurred.)

(Vol. XII, p. 149)

By the Court: You may make your motion?

Mr. Reutlinger: Judge, when you come out saying it like that I just don't think I had better say anything.

If the Court please, the defendants, and each of them, at this time move the Court for a preemptory instruction to find for the defendants on the ground that the plaintiff has failed to make a prima facie case under the—either under Section 1 or Section 2 of the Sherman Act on which this action is based.

By the Court: You want me to rule on that basis on my conception of the law or that announced by the Supreme Court? Overruled.

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TRANSCRIPT OF PROCEEDINGS

VOLUME XIII

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Friday, June 19, 1970.

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(Vol. XIII, p. 3)

By the Court: Good morning, ladies and gentlemen; are we ready to proceed?

Mr. Reutlinger: Your Honor, we have a witness who is not of the organization of the Defendants, and may the record show that the order of proof has, in that respect, been waived?

Mr. Anderson: All right.

By the Court: Come around and be sworn, please sir.

MR. KARL GUSTAV PEARSON, called as a witness, by the Defendants, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Reutlinger:

Q. State your name.

A. My name is Karl Gustav Pearson.

Q. Where do you live, Mr. Pearson?

(Vol. XIII, p. 4)

A. I live in Ann Arbor, Michigan.

Q. And what do you do in Ann Arbor?

A. I am a Professor of Business Administration in the Graduate School of business at the University of Michigan in Ann Arbor and Director of Real Estate Education for the University of Michigan.

Q. Tell us, briefly, your educational background.

A. I graduated—I graduated from Princeton University with a Bachelor of Arts Degree.

Then, I went to the Law School of the University of Michigan and graduated from there with a Doctor of Jurisprudence Degree and from there I went on to Ohio and took and passed the Ohio Bar examination.

Q. Have you ever actively practiced law?

A. Yes sir; during my early months with Firestone Tire and Rubber Company, which I joined on graduation, I worked in the legal department of the Firestone Tire and Rubber Company.

Q. How long did that participation in legal work last?

A. Uh, that was just for a period of three months. After that time Mr. Harvey Firestone, who is the Chairman and Chief Executive of the Company was

(Vol. XIII, p. 5)

kind enough to take me into his office.

Q. And how long did you stay with the Firestone Company?

A. I stayed with the Firestone Company until 1948 with three and a half years out for World War II.

Q. Tell us briefly the basic responsibilities you had with the Firestone Company?

A. Uh, the basic responsibilities I had with the Firestone Tire and Rubber Company were to serve as an assistant to the Chairman, Mr. Firestone, so long as he lived, and afterwards to his successor, Mr. John W. Thomas, and my responsibilities, I really called myself an office boy to the Chairman—consisted of everything from going out and buying him a pocket comb when he lost it to conducting industrial surveys to see whether we should put a new plant in Memphis, Tennessee or Birmingham, Alabama, or Louisville, Kentucky.

Q. When did you start with Firestone?

A. I started with Firestone Tire and Rubber in 1932.

Q. How long were you with them?

A. I was with Firestone Tire and Rubber Company until 1948 with the exception of three and a

(Vol. XIII, p. 6)

half years out for World War II.

Q. In 1948 where did you go?

A. In 1948 I went to Upsala College in East Orange, New Jersey. I had been on the Board of Trustees of Upsala College and the tie-in there was the fact that my father, throughout the period of his lifetime, most of the time a college professor, in the last twenty years of his life as a college professor, was with Upsala and after his death I continued my interests.

They were kind enough to ask me to become a member of their Board of Trustees—So, I served on it until I was appointed to their faculty in 1948.

Q. Did you continue with your scholastic work?

A. Yes sir; I continued to do scholastic work.

Q. Tell us where and in what manner?

A. Uh, so, the particular reason that I went with Upsala College was at that particular time, was all of the fellows returning from the services, uh, there was a great deal of pressure on the College to set up a Department of Business Administration and the College wanted to be responsive to this particular

Vol. XIII, p. 7)

demand and I have always been interested in college teaching particularly because of my father and I had been able to save a little money during my tenure with Firestone, so I felt I could probably afford to become a college professor and so I volunteered for the job of setting up the Department of Business Administration and I served as the Chairman of the Department of Business Administration at Upsala College in East Orange, New Jersey until 1959

when I received a call to Rider College in Trenton, New Jersey, which asked me to become Dean of the School of Business Administration which then was forming, and then I served at Rider College in that capacity from 1959 until 1967 when the University of Michigan was kind enough to ask me to become a professor in its Graduate School of Business Administration and also Director of its Real Estate Educational Program.

Q. Could you give us, briefly, the scope of the Real Estate Educational Program at Michigan?

A. Yes sir; I can. So, at the University of Michigan in the Graduate School we have what we call an area of real estate, and normally, most schools would call it a major in real estate, but it's an area.

In this area of real estate we teach real

(Vol. XIII, p. 8

estate fundamentals. We teach land use economics; we teach real estate appraisal; we teach real estate law; we teach real estate finance; we teach real estate investments, and we have a seminar in urban and in regional planning.

We also, over and above that, have what we call a Certificate Program in real estate. This is not strictly academic in that you cannot get the college or the University Degree from having taken the Certificate Program.

This is primarily for the benefit of the realtors and their sales people throughout the State of Michigan, to give them an education in real estate and also to prepare them to pass the State salesman's examination and State broker's examination and we have some forty-one institutes throughout the State from the Upper Peninsula all the way down, conducting these institutes.

Q. Have you published any works since you have been in the real estate teaching program?

A. Uh, yes sir; I have.

Q. Would you tell us briefly a few of the major works you have published?

A. Yes sir; all of these are not exactly in

(Vol. XIII, p. 9)

the field of real estate. Early in the 1950's I had occasion to become interested in the Small Loan Business, not that I was a borrower, but because there was quite a good deal of interest in it.

So, I published one—really, it was an article on the Small Loan Business, "Saint or Sinner", which was published in the "Business Educational World" and the following year, 1954, another article on the Small Loan Business in the "Credit World."

Then, in 1959, the "Credit World" askged me to prepare an article for it on the financing picture for 1959, which I did.

In 1960 I published a chapter on finance for a new textbook on the principle of marketing, which was brought by the Pitman Publishing Company.

So, those are things I tried to do in an area other than strictly real estate, however in the real estate field I published in 1962 what we call "Success Patterns in Real Estate."

This is published by the Small Business Administration. In 1963 the New Jersey Association of Real Estate Board published a little something that I did which I call, "How to Succeed in Real Estate by Really Trying." In 1965 the New Jersey Association of

(Vol. XIII, p. 10)

Real Estate Board published what I did on the broad base tax and real estate.

In 1966, also the New Jersey Association of Real Estate Board published something I did called "Transportation and Real Estate Values."

Then, likewise, in 1966, the Rider College Press, and I was still at that time with Rider College, published my textbook which is called, "Everyday Real Estate."

Q. Was research required to prepare and write the articles that you have just—

A. (Interrupting) Yes sir; a great deal of research was required.

Q. Are you qualified as a real estate appraiser by any certified board or professional associations?

A. Yes sir; I so happen to be a member of the Society of Real Estate Appraisers.

I also happen to be a member of the American Society of Appraisers.

I am also a member of the Detroit Real Estate Board.

I am a member of the Michigan Real Estate Association and I am a member of the Detroit Real Estate Association and I am a member of the New Jersey Asso-

(Vol. XIII, p. 11)

ciation of Real Estate Board.

Q. Have you had recent occasion to consider an appointment with the Federal Reserve Board?

A. Uh, yes sir; on Monday, June 18th, just a week ago last Monday, I received a call to go down to Washington, D. C., to meet with people in the Federal Reserve Board and they asked me whether I would consider an offer to become a consultant to the Federal Reserve Board. I haven't made up my mind as to whether I can accept that because currently I am trying to complete two new books on real estate, one of which we will call, "Real Estate Today", to be published by Richard D. Irwin, and the other one, which will be called, "Michigan Real Estate", to be published by Prentice-Hall, but at any rate, I have the offer.

Q. What particular sphere of interest did the Federal Reserve people indicate your consulting work would be required in?

A. The particular sphere of interest that they indicated to me that they wanted me to research on was the Mortgage Money Market.

Q. Now, Mr. Pearson, you may assume for purposes of the balance of this testimony that Fortner Enterprises has procured from the Credit Corporation,

(Vol. XIII, p. 12)

which is a wholly-owned subsidiary of the United States Steel Corporation, all of the required money to buy either developed lots or lots which were undeveloped and then enough money or sufficient funds to completely develop those lots.

When I use the word "development" I am using it in the sense that the lots would be prepared for construction. I do not mean that any buildings were constructed on them, but simply the installation of roads, streets, utilities and so forth.

(Witness nodded head in the affirmative.)

Q. And that, in addition to the money required to completely develop, and the land, eighty-five per cent of the appraised value of the completed unit, house and lot, was also given or afforded Fortner Enterprises, but deducting the cost of the lot which he had earlier acquired with the borrowed funds.

A. Un-huh.

Q. Bearing that situation in mind and, based on your knowledge, experience, research and your analysis and evaluation of the material information at hand, do you have an opinion generally, throughout the United States during the years 1959, 1960 and 1961, whether or not something similar to the Fortner trans-

(Vol. XIII, p. 13)

action which I have just described was available?

A. Yes sir.

Mr. Anderson: Objection, Your Honor.

By the Court: Overruled.

Mr. Anderson: May we be heard?

By the Court: Huh?

Q. The question was did you have an opinion?

A. Yes sir; I do.

Q. And what is your opinion?

A. That—my opinion is that in the years 1959, 1960 and 1961 in the country as a whole, one hundred per cent financing comparable to that secured by Mr. Fortner was available in other parts of the country and it is likewise available in the Louisville area.

Q. Now, did you at my request sometime in the recent past—I'm speaking now of the last six months—come to Louisville for the particular purpose of ascertaining the answer to the question about which you have just spoken?

A. Yes sir; I did, on April 10th, and May 6th and May 27th.

(Vol. XIII, p. 14)

Q. And as a result of your investigation here in Louisville and based on your experience, research and analysis and evaluation of material, were you able to form an opinion as to whether or not financing similar to that afforded Mr. Fortner was available here locally in the Louisville market during 1959, 1969 and 1961?

A. Yes sir; I was.

Mr. Anderson: Objection again, Your Honor.

By the Court: Overruled.

Q. And what was your opinion with regard to that availability?

A. My opinion with regard to the Louisville area in the years 1959, 1960 and 1961 was that what we call one hundred per cent mortgage financing was available in the Louisville area.